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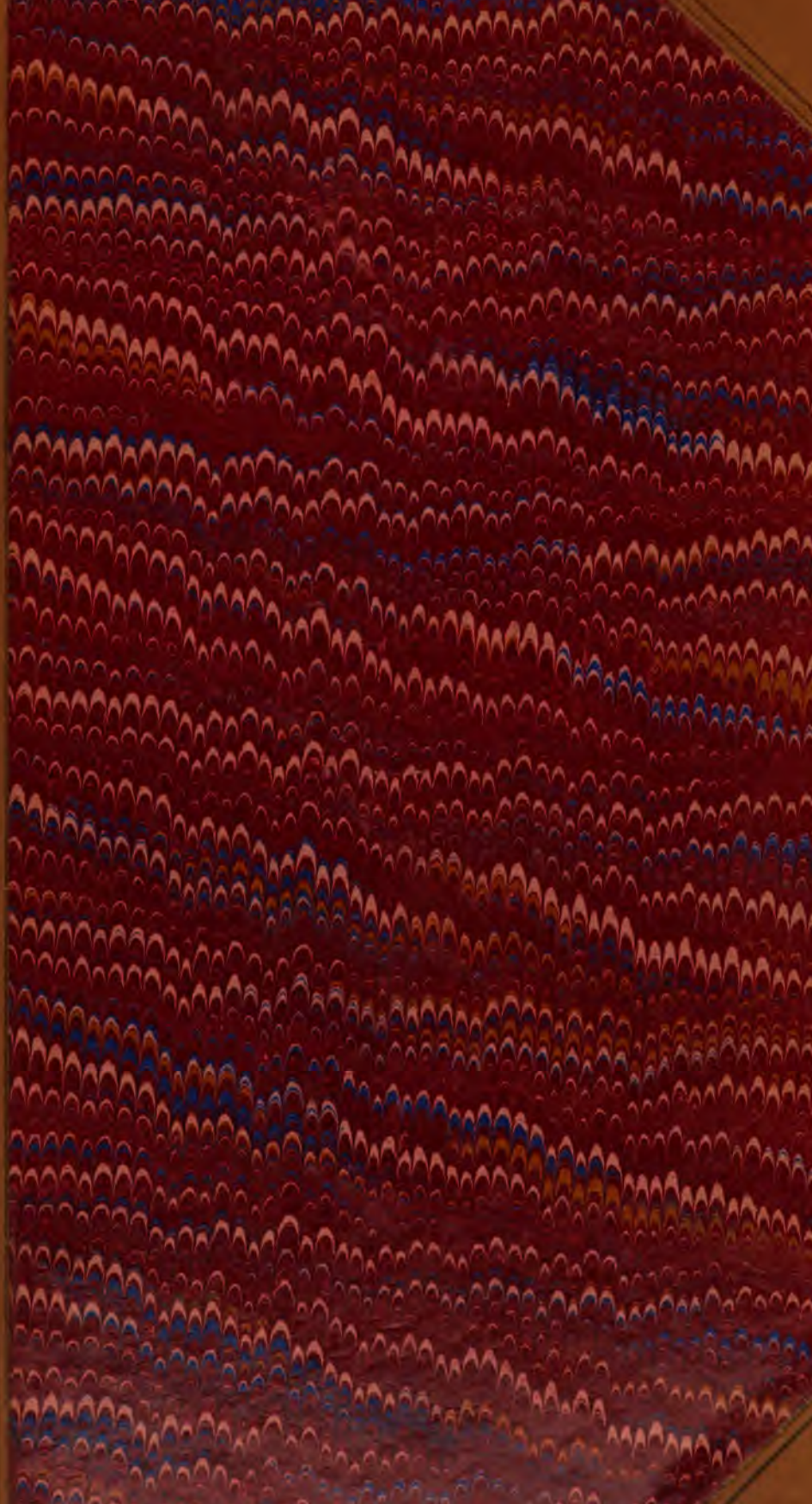
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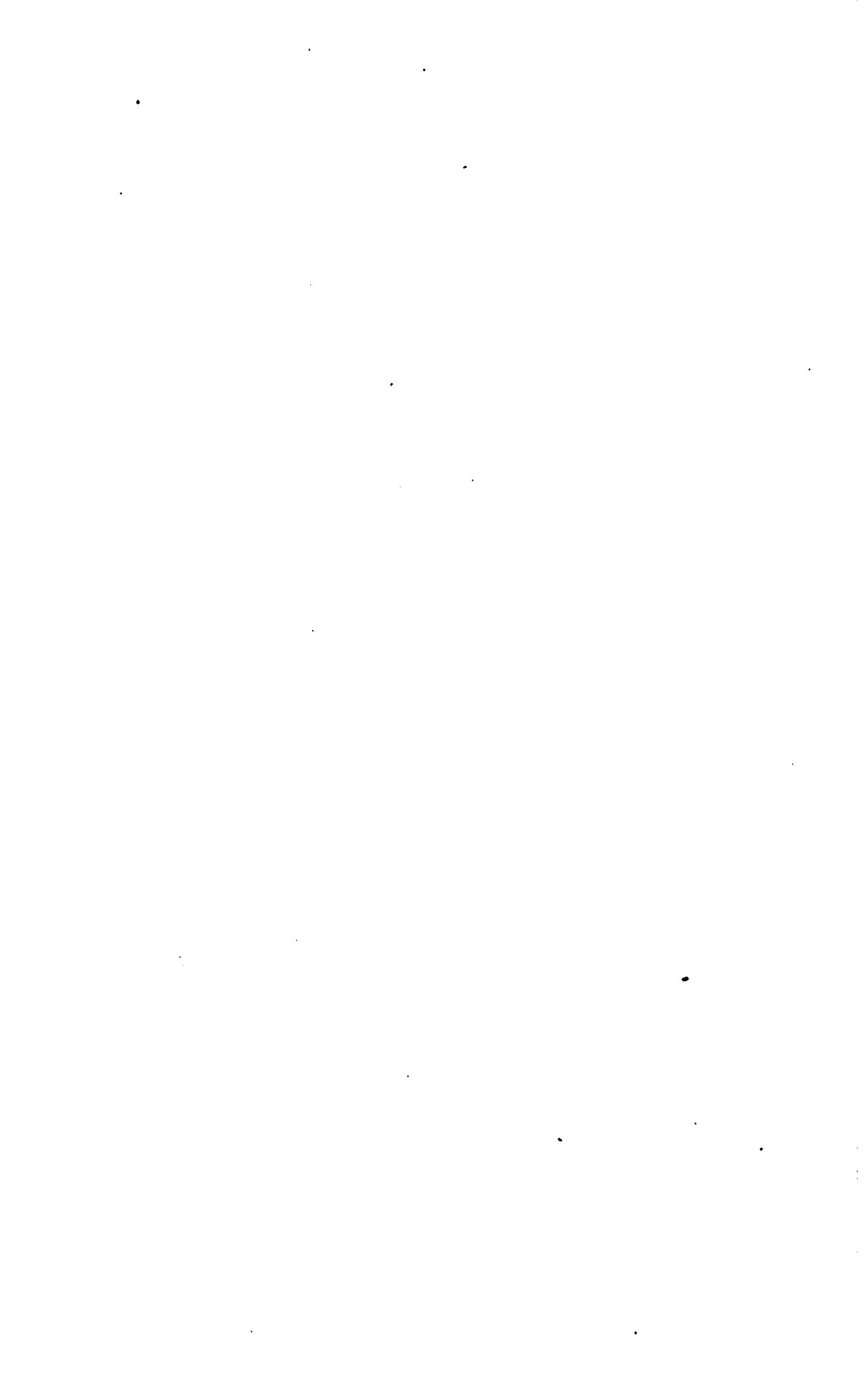
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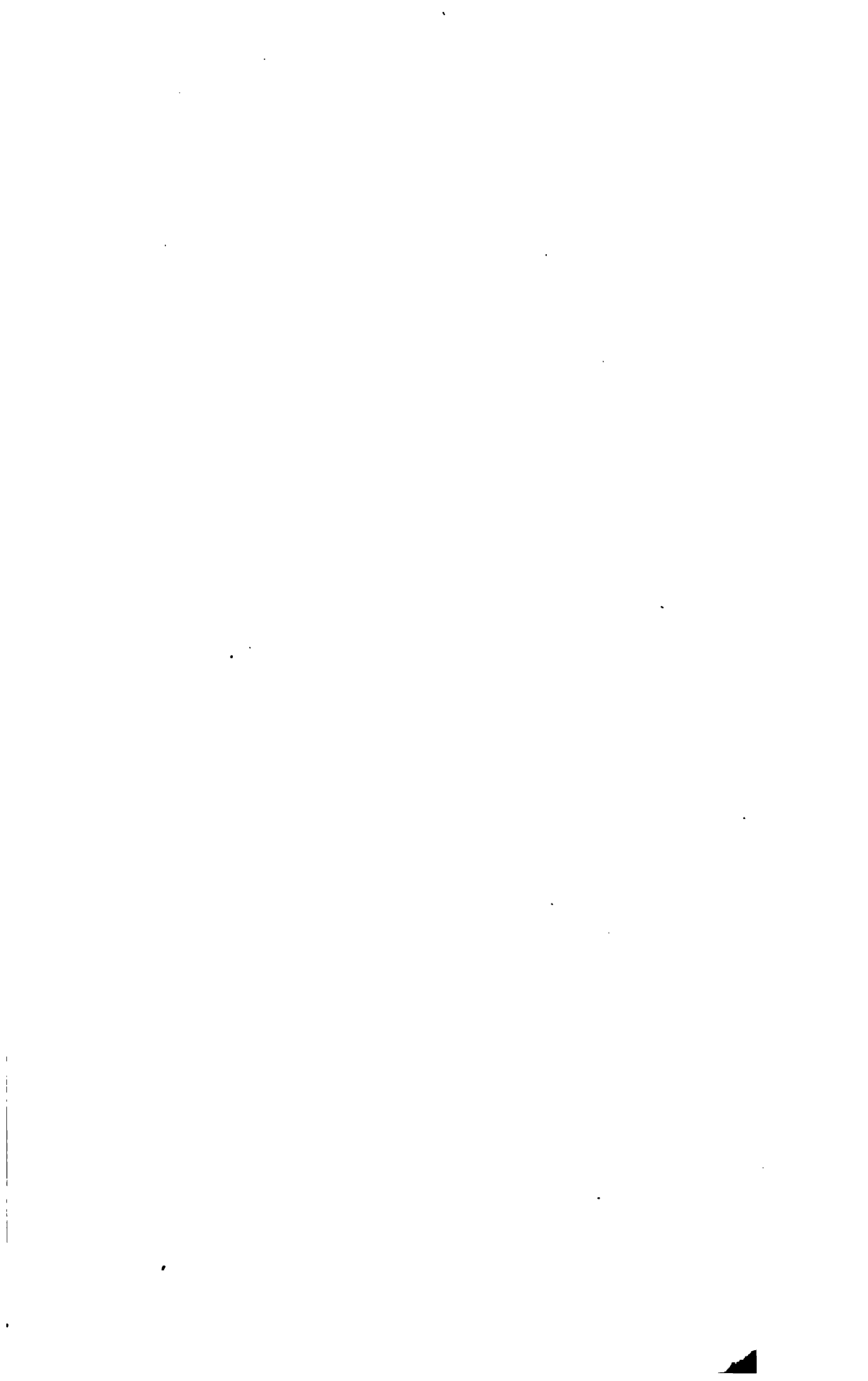
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PUBLIÉS PAR LE BARREAU DE LA PROVINCE
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COUR SUPERIEURE

(EN PREMIÈRE INSTANCE ET EN RÉVISION).

VOL. XXX—1906.

W. C. LANGUEDOC, C.R.,
REDACTEUR EN CHEF.

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DE LA

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Procureur-général :

L'HONORABLE LOMER GOUIN, C.R.

NOTE

Le 30 août 1906, les honorables MM. J. C. McCorkill, Eug. Lafontaine et L. P. Demers ont été nommés juges de la Cour Supérieure.

Le 3 nov. 1906, décès de l'honorable J. A. C. Madore, J. C. S.

Le 24 nov. 1906, l'honorable C. J. Doherty s'est démis de ses fonctions de Juge de la Cour Supérieure.

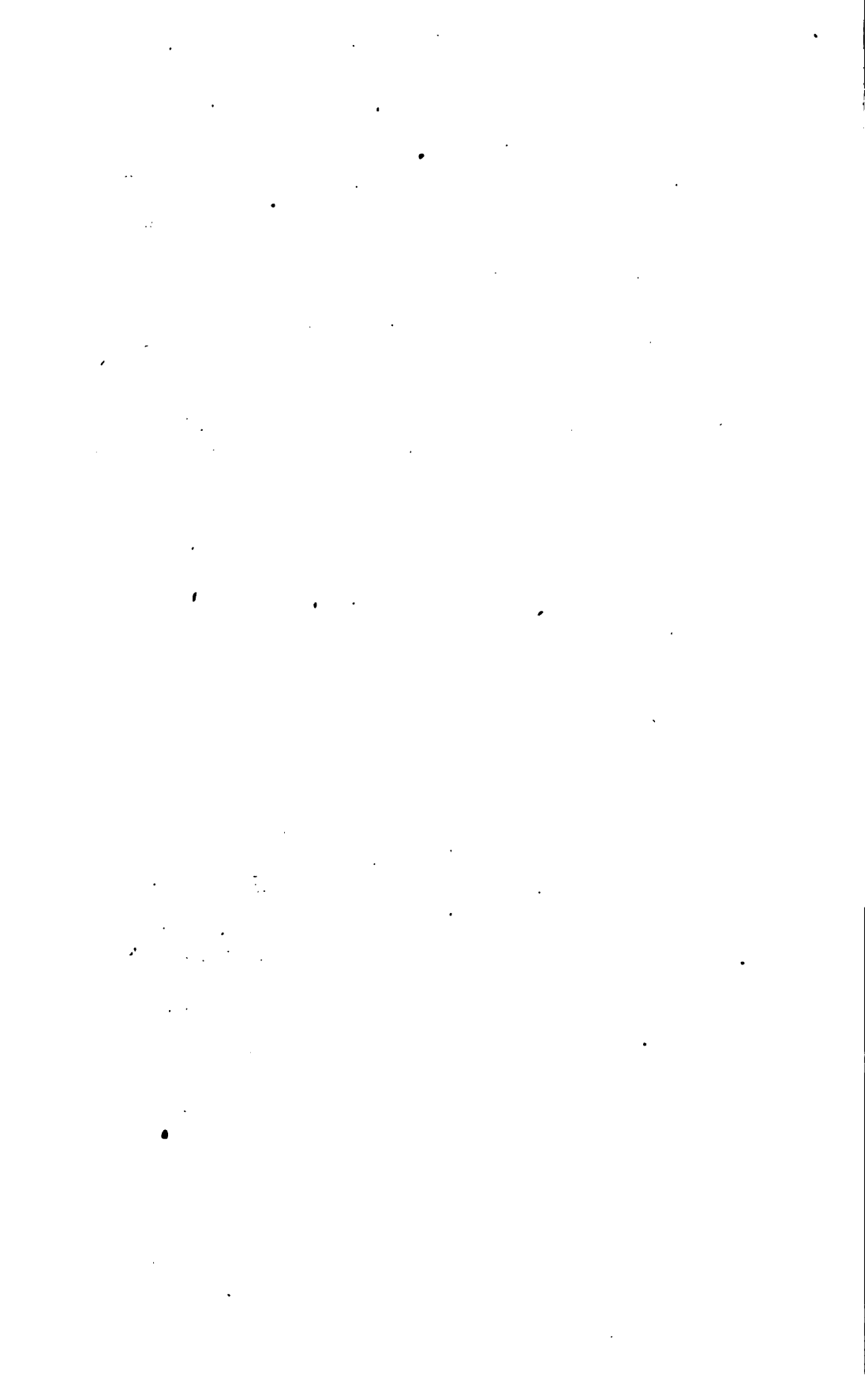


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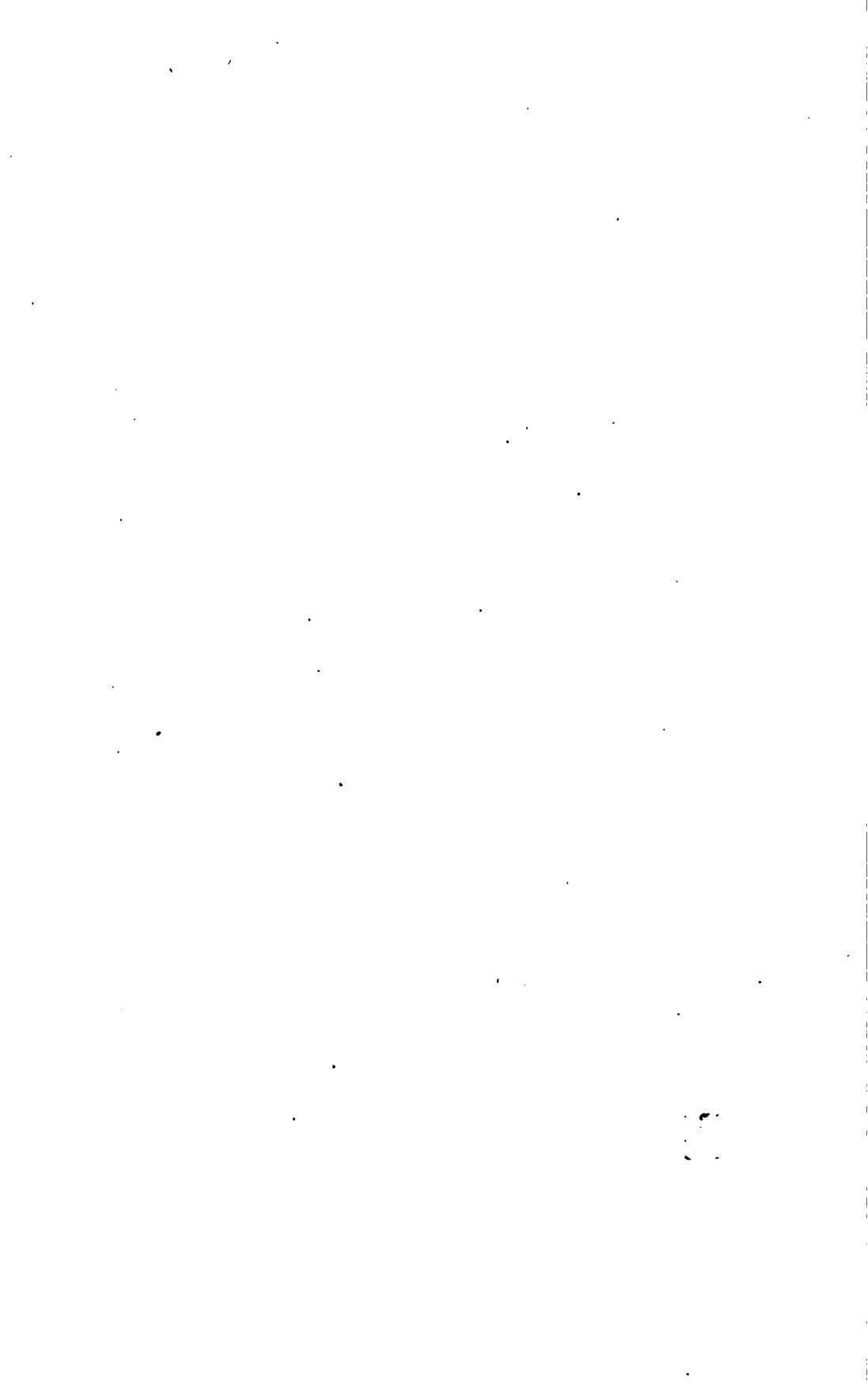
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COUR SUPÉRIEURE.

QUÉBEC, 1 mars 1906.

*Présent :—*LARUE, J.

PROULX v. KLINEBERG & SHEFFER, opposante.

*Contrat de mariage—Donation comme gain de survie—
Droits de la femme donataire—Donation de biens mo-
biliers—Enregistrement—Cadeaux de nocces.*

JUGÉ :—1o. La donation de biens faite à la femme par contrat de mariage comme gain de survie, ne prend effet qu'au décès du mari. Du vivant de ce dernier la femme n'a aucun droit à ces biens, ni qualité pour former opposition à la saisie qui en est faite par les créanciers du mari. (1)

2o. La donation contractuelle de biens mobiliers lorsqu'elle n'est pas suivie de tradition réelle au donataire et de possession publique par lui est sujette à l'enregistrement.

3o. Les cadeaux de nocces sont censés faits à la future épouse et sont sa propriété sous le régime de la séparation de biens.

LARUE, J. :—

La demanderesse ayant obtenu jugement contre le défendeur, a saisi dans la maison occupée par ce dernier à Montréal, et comme à lui appartenant, une certaine quantité de meubles et effets énumérés au procès-verbal de saisie.

L'opposante, son épouse séparée de biens par contrat de mariage, réclame comme sa propriété tous les meubles saisis et ce, sous trois chefs :

1o. Partie provenant d'une donation à elle faite par son mari, par son contrat de mariage ;

2o. Partie étant des cadeaux de nocces ;

3o. Partie étant des achats faits par elle avec son argent ou provenant de son travail.

La demanderesse s'est inscrite en droit et a, en outre, contesté l'opposition.

(1) *Vide* Dorval v. Préfontaine, 14 B. R. 80.

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Dalloz, jur. gén. vbo Dispositions, No 1350.

Il est essentiel, pour qu'il y ait donation entre-vifs, que le donateur se dessaisisse actuellement de la chose donnée—755, 777 C. C.

Notre jurisprudence est dans le même sens.

Pagé & Beauchamp & Beauchamp, opposant ⁽¹⁾

Ferland & Savard & Robitaille, opposant ⁽²⁾

Boivin & Coulombe & Tanguay, opposant ⁽³⁾

Voir aussi :

Newman & Depocas & Lalonde, opposant ⁽⁴⁾

Demers & Blacklock & Stewart, opposant ⁽⁵⁾

Il n'est pas douteux dans le cas actuel que la donation n'est pas une donation entre-vifs, mais bien une donation de biens à venir.—et à mon avis, le paragraphe huit suscit   lui donne bien clairement ce caract  re, en d  clarant que la donation sera nulle en cas de pr  d  c  s.

Il y a plus.

Lors m  me que la donation e  t   t   entre-vifs, elle   tait nulle, faute d'enregistrement du contrat de mariage.

La donation contractuelle de biens meubles est sujette    l'enregistrement (806, 808 C. C.)    moins qu'il n'apparaisse bien clairement que le donataire a eu la tradition r  elle et la possession publique des choses    elle donn  es par son contrat de mariage.

McGarvey & Sauv  le & Lecomte, opposant ⁽⁶⁾

(Mathieu, J.)

McIntosh & Reiplinger & Brennan, intervenant ⁽⁷⁾

(Davidson, J.)

Bouchard & Beaulieu & Beaulieu, opposant ⁽⁸⁾

(1) 20 C. S., 220.

(2) 11 C. S., 404.

(3) 11 C. S., 405.

(4) 17 C. S., 477.

(5) 12 C. S., 43.

(6) 15 R. L., 462.

(7) 7 R. J. O. C. S. 456.

(8) 14 R. J. O. C. S. 493.

(Cimon J.)

4 Mignault, p. 153.

Il n'appert pas que l'opposante ait eu la tradition réelle et la possession publique des effets à elle donnés par son contrat de mariage.

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Elle a toujours eu le même domicile que son mari depuis son mariage le 8 juillet 1894 et à venir jusque dans l'autonne, alors que le défendeur a fait cession de ses biens, il faisait commerce en son nom. Après la faillite du défendeur, l'opposante a repris le commerce de son mari sous le nom social de L. Klineberg & Co, avec son mari comme gérant,—et ce n'est pas parce qu'un bail de la maison aurait été consenti à L. Klineberg & Co, en 1905 et continué le six février 1906 que l'on peut conclure à la tradition réelle et à la possession publique.

Pour ces raisons, je suis d'avis que l'opposante ne peut réclamer en vertu du contrat de mariage.

Il en est autrement quant aux effets qui lui appartiennent pour les avoir achetés de son argent et quant aux cadeaux de nocces, lesquels, d'après la jurisprudence, sont censés être donnés à la future épouse. La seule preuve de propriété de ces effets est celle faite par l'opposante, et elle n'est pas contredite.

Il y a toutefois une difficulté. Un certain nombre d'objets mentionnés dans la liste annexée au contrat de mariage et donnés par le mari seraient aussi, d'après le témoignage de l'opposante, des cadeaux de nocces. L'opposante dit que ces cadeaux ont été mentionnés sur la liste afin d'affirmer son droit de propriété.

Je crois que l'opposante devrait avoir le droit de les distraire de la saisie.

Je vois aussi que certains effets mentionnés au contrat de mariage auraient été renouvelés ; mais comme il appert par le témoignage du défendeur que c'est lui qui avait pourvu aux frais de la maison, je n'ai pas d'hésitation à déclarer qu'ils sont, à mon avis, la propriété du défendeur.

Je crois faire la mesure large à l'opposante en maintenant

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la contestation pour les objets suivants, donnés par le contrat de mariage :—

Dans le salon:
Deux paires de rideaux, dentelles et pôles et un tapis de Bruxelles de vingt-quatre verges.

Dans la chambre à coucher :
Une couchette en cuivre, un sommier, un matelas, un grand couvre-pieds blanc, deux couvertes en laine, deux draps de lit en coton, deux oreillers en plumes.

Dans la salle à dîner :
Un cabinet en chêne à vaisselle avec portes en vitres et tablettes, et en la renvoyant quant au reste.

Dans ces circonstances, chaque partie devra payer ses frais, sauf ceux de l'inscription en droit qui sont à la charge de l'opposante, la dite inscription en droit étant maintenue.

J. E. Prince, procureur de la demanderesse contestante.
Caron, Gibson & Dobell, procureurs de l'opposante.

COUR DE RÉVISION.

QUÉBEC, 27 février 1906.

Présents.—CIMON, LARUE ET SIR C. A. P. PELLETIER, JJ.

MONTREUIL v. THE QUEBEC RAILWAY LIGHT & POWER CO.

Responsabilité—Collision de cheval avec tramway—Faute du conducteur du cheval.

JUGÉ :—Le demandeur qui, prétendant avoir dû abattre son cheval blessé par un tramway, a actionné la compagnie propriétaire de ce dernier, comme responsable de l'accident, est à bon droit débouté de son action sur le double motif, d'une part, qu'il est établi par les témoignages recueillis et les circonstances de la cause, qu'au moment de la collision il conduisait son cheval à une allure trop vive, dans un endroit dangereux, et que, d'autre part, il n'a pu faire la preuve d'aucune faute à l'encontre de la compagnie ou de ses employés.

LARUE, J. :—

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Le demandeur réclame \$225, valeur d'un cheval, à lui appartenant, et qui a été frappé par une voiture électrique appartenant à la défenderesse, le 12 septembre dernier, et qui a dû être abattu, le choc ayant cassé une patte au cheval. Il accuse la défenderesse de négligence en ce que le char allait à une trop grande vitesse et en ce que la cloche d'alarme ne sonnait pas.

La défenderesse, au contraire, allègue que le char allait très lentement; que la cloche sonnait et qu'il n'y a aucune négligence à elle imputable. Elle ajoute que la cause de l'accident c'est l'allure trop rapide donnée par le demandeur à son cheval, lequel n'a pas été frappé, mais a eu la patte cassée par suite du brusque arrêt à lui imprimé par le demandeur en voulant le faire détourner.

Le jugement de première instance a renvoyé l'action donnant pour raison que l'accident était dû au fait que le cheval du demandeur allait à une allure trop rapide.

Le 12 septembre, Beaumont (l'un des demandeurs), accompagné de Fortier, venant de la station du C. P. R., a traversé la place d'Orléans, lorsque, arrivé à l'intersection de la rue Ramsay, près de l'usine du gaz, un char de la compagnie défenderesse a frappé le cheval, lui fracturant une patte. Le cheval a été alors abattu.

Y a-t-il négligence quelque part, et qui a causé l'accident ? C'est là toute la question.

La gare de la défenderesse, rue St Paul, est à une distance de pieds environ, du lieu de l'accident.

La voie, de la station, coupe à angle droit la rue St Paul, croise sur la rue St André la ligne du Pacifique et traverse ensuite le pont sur la rivière St Charles.

La rue Ramsay court parallèlement avec les lignes de la défenderesse depuis la rue St Paul jusqu'à la place d'Orléans.

La place d'Orléans débouche à angle très oblique sur la rue Ramsay, et le conducteur d'une voiture ne peut voir la voie de la défenderesse à l'est sur la rue Ramsay, qu'après avoir

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commencé à détourner cette courbe, et ce, surtout à cause d'une maison située au coin sud de la rue Ramsay. C'est un endroit très dangereux d'après l'admission de tous. Beaumont et son employé connaissaient les lieux.

Il fallait donc s'approcher de cet endroit dangereux avec les plus grandes précautions possibles.

Beaumont tenait les rênes et menait son cheval au petit trot et il a détourné le coin de la rue Ramsay à cette allure qui, sur un chemin ordinaire, serait considérée, comme très modérée. Il n'a vu le char en mouvement que lorsqu'il s'est trouvé à une distance de vingt-cinq pieds environ. C'est alors qu'il a voulu arrêter son cheval brusquement et le tourner; mais il n'en a pas eu le temps. Fortier n'ayant pas les rênes, dit qu'il ne s'est pas occupé du cheval, n'ayant pas de responsabilité.

Un nommé Flageole, qui travaillait sur la ligne du C. P. R. à une distance de cent cinquante pieds environ et qui voyait le char en mouvement et le cheval arriver au détour de la rue, s'est dit immédiatement qu'un accident allait arriver.

Je n'éprouve aucune hésitation à déclarer que, suivant moi, le cheval du demandeur était conduit à une allure trop rapide en décrivant la courbe en question. Les règles les plus élémentaires de la prudence exigeaient l'allure la plus tranquille en cet endroit.

Comme le dit Abbott, on *Railway Law*, p. 380 :

" It is the accepted principle that the duty cast upon the
" traveller, in approaching a railway crossing by the highway
" is to make use of his senses of sight and hearing, and both
" to look and listen for an approaching train,—that is to say,
" that he is bound to listen for the signal, and to look both
" ways up and down the track, to see if a train is approach-
" ing ; and if he neglects these precautions and goes blindly
" upon the track, and is injured or killed, he himself is the
" cause of his own misfortune, and this has been held, even
" in the case of omission to give the signals by the engineer
" in charge of the engine." (Arrêts cités)

La compagnie était-elle aussi en défaut ? La preuve démontre le contraire.

Les chars, s'il y en avait, venaient de laisser la gare à deux ou trois cents pieds et étaient au moment de laisser la voie du Pacifique. Ils allaient et devaient nécessairement aller lentement, surtout à cause du fait qu'ils devaient arrêter et sont arrêtés à peu de distance plus loin pour demander et obtenir le droit de passage sur le pont de la rivière St Charles et qui est commun à la compagnie du lac St Jean et à la défenderesse.

D'un autre côté, la cloche et le sifflet ont sonné et sifflé à plusieurs reprises et même lorsque le motorman a vu le cheval. (McMahon, conducteur, Carrier, motorman, et Renaud, un passager).

Il est vrai que Beaumont et Fortier n'ont pas entendu, non plus que Flageole et Rhéaume. Mais il faut remarquer que ces deux derniers sont des employés de chemins de fer, habitués au bruit de la cloche et du sifflet et qui, en conséquence, ne remarquent plus ces bruits.

Il faut nécessairement adopter de préférence la preuve affirmative.

Sur le tout, le tribunal est d'avis que l'accident a pour cause l'imprudence du conducteur de la voiture et qu'il n'y a pas lieu d'imputer à la compagnie défenderesse aucune imprudence ou manque de précaution.

Et pour cette raison, le jugement doit être confirmé.

Fitzpatrick, Taschereau, Roy, Cannon & Parent, pour le demandeur.

Curon, Pentland, Stuart & Brodie, pour la défenderesse.

COUR DE RÉVISION.

MONTRÉAL, 30 avril 1906.

Présents:—PAGNUELO, ROBIDOUX ET PARADIS, JJ.

AWDE v. CHAUREST.

Mandat—Notaire et client—Mandat ad negotia—Mandat salarié—Substitution de mandat—Responsabilité du mandataire principal—Cession de créance—Renonciation implicite aux recours de droit.

Jugé :—10. Le notaire à qui une cliente confie le montant d'un prêt pour

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le remettre à l'emprunteur, agit comme mandataire *ad negotia*, et comme mandataire salarié, lorsqu'il partage avec le notaire de l'emprunteur la commission usuelle prélevée sur l'emprunt. Dans l'exécution de ce mandat, en versant les fonds entre les mains d'un autre que emprunteur même, notamment du notaire de ce dernier, il se substitue cette personne et est responsable des pertes provenant de son fait.

20. Le prêteur qui cède à un tiers avec garantie de fournir et faire valoir une créance qu'il croit réelle, mais qui n'est en réalité que fictive, ne renonce pas par là aux recours qu'il peut avoir contre ceux par le fait desquels cette créance a été contractée fictivement et qui sont la cause du remboursement qu'il a dû en faire à son cessionnaire.

PARADIS, J., *dissentiente*.

PAGNUELO, J.—

Le défendeur a été condamné à payer à la demanderesse une somme de \$1,200 qu'il avait prêtée pour elle, comme son chargé d'affaires, à un nommé Léger et qui a été perdue par suite d'une fraude dont il a été victime et dont il aurait pu se préserver s'il avait apporté à l'affaire la prudence que la demanderesse lui supposait. Voici dans quelles circonstances.

Le notaire Bastien demanda au défendeur, qui est aussi notaire, s'il n'avait pas un client qui prêterait \$1,200 sur première hypothèque. Le défendeur en parla à sa cliente, la demanderesse, qui avait ce montant à placer. Elle lui recommanda bien de prendre toutes les précautions, d'examiner les titres, d'avoir le certificat du régistrateur et celui du secrétaire municipal pour l'évaluation de l'immeuble. Le défendeur obtint les documents qui se trouvèrent satisfaisants. L'acte d'emprunt et d'hypothèque fut préparé par le notaire Bastien qui prit jour avec le défendeur pour faire rencontrer les parties à Montréal. Au jour dit, le notaire Bastien arriva seul avec l'acte signé par Léger, l'emprunteur. Le défendeur apprenant que Léger ne venait pas, fit signer un chèque par la demanderesse devant deux témoins, car c'est une femme sans instruction qui ne sait pas même signer son nom. Ce chèque préparé par le défendeur Chaurest était payable à l'ordre de Chaurest ou au porteur. Il se rendit seul au bureau de Bastien, où il signa l'acte

de prêt hypothécaire pour la demanderesse qu'il représentait comme son chargé d'affaires et il le remit (le chèque) à Bastien après l'avoir endossé. Quelque temps après, il remit à sa cliente une copie de l'obligation avec le certificat d'enregistrement et lui recommanda d'être tranquille. Tout allait bien.

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L'acte était un faux. Léger ne l'avait pas signé, il ne signait pas son nom. Il ne connaissait rien de l'affaire. Le notaire Bastien qui avait tout comploté, avait détourné les \$1,200. De là l'action en indemnité par la demanderesse contre son chargé d'affaires qu'elle accuse de négligence.

Celui-ci plaide qu'il a été la victime d'une fraude, qu'il ne pouvait prévoir. La loi du notariat n'exige pas que les parties signent l'acte en même temps et en présence l'une de l'autre. Le notaire peut recevoir les signatures en des endroits et à des dates différentes, en mentionnant le fait dans l'acte (S. R. Q. art. 3647). Une telle mention n'existe pas dans l'acte en question. Le notaire Bastien, porteur de la minute supposée signée de l'emprunteur, a lui-même signé l'acte après le défendeur et l'a ainsi complété en y apposant sa propre signature. Le défendeur a été trompé comme tout autre l'aurait été, comme il l'aurait été s'il eût prêté ses propres fonds. Sur ce point, il a peut-être raison, mais on lui reproche d'avoir remis le chèque à Bastien payable au porteur, au lieu de le remettre à l'emprunteur, ou de le rendre payable à l'ordre de l'emprunteur, suivant l'usage. Il a chargé Bastien de remettre les fonds à Léger, et il n'était pas autorisé à le faire. Un homme prudent ordinaire ne l'aurait pas fait. S'il a suivi la foi de Bastien, si par délicatesse de confrère, il lui a confié les \$1,200 pour les remettre à Léger, il a manqué de prudence.

Le défendeur soutient, en supposant véritable la signature de l'emprunteur, que Léger reconnaissant avoir reçu les \$1,200. "à la passation des présentes," donnait mandat à Bastien de retirer la somme empruntée lorsqu'il complèterait l'acte en y apposant sa propre signature. Si cette proposition est vraie, Chaurest a payé au mandataire de Léger, et sa responsabilité est à l'abri ; sinon c'est lui, Chaurest, qui a constitué Bastien son mandataire, pour remettre les fonds à Léger, et dans ce

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cas, il est coupable de négligence et d'avoir excédé son mandat.

Le mandataire, dit l'art. 1711 C. C., répond de celui qu'il s'est substitué dans l'exécution du mandat lorsqu'il n'est pas autorisé à le faire. Voilà, suivant moi, comme la question se présente. L'élection de domicile chez le notaire pour le paiement, ne donne pas au notaire le pouvoir de recevoir la dette. Le pouvoir de vendre n'implique pas celui de retirer le prix. Le pouvoir de signer des billets promissaires n'implique pas celui d'endosser, ni d'accepter des lettres de change, même le pouvoir de retirer le premier versement n'implique pas celui de retirer le deuxième. En d'autres termes, le mandat doit être exprès et ne se présume pas. Le mandat conçu en termes généraux, dit l'art. 1703 C. C., n'embrasse que les actes d'administration ; s'il s'agit d'aliéner ou d'hypothéquer ou de tout acte quelconque de propriété autres que les actes d'administration, le mandat doit être exprès. Le mandataire ne peut rien faire au-delà de ce qui est porté dans son mandat ou peut s'en inférer, ajoute l'art. 1704. Il peut faire tout acte qui découle de cette autorité et qui est nécessaire à l'exécution du mandat, mais il ne peut aller au-delà.

En supposant que Léger eût signé l'acte qui reconnaissait le paiement des \$1,200, on ne peut inférer qu'il lui donnait le pouvoir de recevoir les deniers prêtés. Cela ne rentrait pas nécessairement dans ses attributions de notaire instrumentant. Le devoir de Chaurest était de ne payer qu'à l'emprunteur, ou à quelqu'un dûment autorisé par lui à recevoir. Il n'avait pas le droit de faire courir de risque à son client. Comment se ferait ce paiement ? Il y a une voie bien connue et bien usitée, c'était un chèque accepté à l'ordre de l'emprunteur, ou endossé à l'ordre de l'emprunteur.

Il ne faut pas donner une portée exagérée à l'article 3647, S. R. Q., qui permet au notaire de recevoir les signatures séparément. Cela s'entend de l'apposition des signatures seulement, quand il n'y a pas autre chose à faire pour compléter la transaction; v. g., dans un contrat de donation, un bail, même un contrat de mariage, mais le prêt est un contrat réel où la vo-

l'onté des parties ne suffit pas il n'est complet que par la livraison des espèces. Cette loi donne au notaire un pouvoir dangereux quelquefois et que les parties feront sagement de contrôler. Mais la signature, même si elle eût été réelle, n'impliquait nullement un mandat de retirer un paiement ou une somme empruntée.

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Il me semble donc que M. Chaurest a manqué de prudence en confiant les \$1,200 à Bastien; qu'il s'est substitué un mandataire infidèle, dont il répond, et qu'il est responsable de la perte des \$1,200.

Le mandat dont le défendeur s'est chargé volontairement pour la demanderesse, n'était pas un mandat gratuit, mais un mandat salarié qui rentrait dans l'exercice ordinaire de sa profession. Tous deux l'ont compris ainsi, comme le prouve la conversation rapportée par M. Chaurest lui-même, lorsqu'il a remis une copie de l'acte d'obligation à sa cliente en lui recommandant de n'être pas inquiète, que son argent était bien placé. Elle lui demanda alors combien elle lui devait; il répondit qu'elle ne devait rien, que c'était l'emprunteur qui lui paierait sa commission, suivant l'usage. En effet, le notaire Bastien lui remit \$9 partageant avec lui la commission de $1\frac{1}{2}\%$, partage ordinaire dans ces cas.

Le mandat du défendeur doit être considéré un mandat salarié, quoiqu'il ait été payé de sa commission, non par son client, le prêteur, mais apparemment par l'emprunteur.

C'est ce qui a été jugé par l'arrêt de la Cour de Cassation du 14 janvier 1856 (Bordout & Lefebvre—S. 57, 1, 210).

Bordout, (le notaire) avait reçu une rémunération quelconque, en sus de ses honoraires pour la simple rédaction des conventions des parties. Il importe peu, dit l'arrêt, que cette rémunération lui ait été payée par l'emprunteur, ce qui se fait toujours inévitablement; il suffit, pour aggraver sa responsabilité qu'il ait trouvé, dans l'accomplissement de son mandat, l'occasion d'un émolument certain et attendu que son mandat consistait à trouver un placement solide, ne présentant pas de chances mauvaises, et garanti par une première hypothèque; attendu que les immeubles acceptés comme garantie suffisante,

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dant, l'autorité du notaire Bastien lui en imposant ; elle signa donc un transport avec garantie de fournir et faire valoir en faveur de Godin, qui lui compta les \$1,200. Lorsque les faux furent découverts, Godin la somma de lui remettre les \$1,200, ce qu'elle fit après avoir consulté son avocat; elle y était tenue légalement. On dit qu'elle eût tort de garantir la dette, qu'elle aurait dû recevoir son argent et donner une quittance pure et simple.

Si elle n'eut pas fait un transport, elle n'eut pas été remboursée. car ce n'était pas Bastien qui payait, c'était un tiers qui cherchait un placement. Il lui fallait ou faire un transport ou refuser le remboursement. Dans l'un et l'autre cas, elle était en face de l'acte faux, et tenue, ou de rembourser Godin ou de rester avec son obligation sans valeur. Un transport, même stipulé sans garantie, oblige toujours le cédant à la garantie que la dette est due (art. 1576 C. C.).

On ajoute que si elle eût refusé un transport, Godin aurait pu prendre subrogation en vertu de l'art. 1155, § 2 C. C., en faisant intervenir le débiteur Léger. Cette proposition se détruit elle-même, car il fallait dans ce cas un emprunt par Léger de Godin, et une quittance par le créancier primitif, avec l'énonciation que le paiement avait été fait des deniers empruntés par Léger de Godin qui devenait le nouveau créancier. L'acte d'emprunt nouveau aurait été un faux, et Godin qui aurait été induit par fraude et erreur à payer les \$1,200 à la demanderesse, aurait pu les répéter comme payés par erreur pour une dette non existante (art. 1047 & 1048 C. C.).

La demanderesse ne s'est pas fait tous ces raisonnements. Elle a reçu son argent malgré elle, en déplorant de perdre un si bon placement, et elle a signé le transport que lui a présenté le notaire Bastien. Il lui a fallu plus tard remettre les deniers à Godin. La cause première et unique est le faux dans l'acte d'obligation du 21 mars 1896 en faveur de la demanderesse.

Enfin, le défendeur a prétendu que la demanderesse avait ratifié l'acte de prêt du 21 mars 1896 en transigeant sur la créance avec le notaire Bastien, lorsque les faux furent décou-

verts. Elle a, dit-il, ratifié sans réserve tous les actes faux soit expressément, soit tacitement, et le défendeur est déchargé de toute responsabilité.

La seule preuve des faits se trouve dans le témoignage de la demanderesse, et voici à quoi ils se réduisent. Quelques jours après la découverte des faux, et le remboursement des \$1,200 par la demanderesse à M. Godin, on fit venir la demanderesse au bureau du notaire Bastien à Montréal, au sujet de son affaire. Elle y rencontra le défendeur, le notaire Bastien et son frère.

“ Q.—Il vous a été offert de régler cela moyennant tant dans la piastre, je suppose ?

R.—Oui, M. Chaurest s'est levé et il a signé un papier pour de l'argent qu'il avait prêté pour deux de ses cousines, quatorze cents piastres (\$1,400.00), comme quoi il prenait *quarante cents dans la piastre, pareil comme moi*". Là-dessus, M. Chaurest s'est mis à dire: "On est mieux d'accepter ces quarante cents-là dans la piastre que de tout perdre."

“ Q.—Lui, il acceptait pour ses cousines quarante cents dans la piastre ?

“ R.—Il a dit : "On est mieux d'accepter ces quarante cents-là que de tout perdre". J'ai dit : "*Moi, ça ne me coûterait pas d'accepter ces quarante cents-là dans la piastre, si vous étiez assez bon de me remettre la balance*". Il a dit : "*Vous comprenez, madame St Denis, que je ne suis pas pour vous remettre la balance de cet argent-là, sans savoir si je suis responsable*." Toujours que M. Bastien est mort et on n'a rien eu.

“ Q.—Vous n'avez pas signé ?

“ R.—J'ai signé un papier, pareil comme lui. C'est lui qui m'a donné le papier et j'ai signé — il a signé devant moi".

C'est ce que le défendeur appelle une ratification sans réserve de l'acte du 21 juin 1896.

“ Ces faits, dit-il dans son factum, prouvent clairement que "la demanderesse a traité directement avec Bastien comme "son débiteur, alors qu'elle connaissait le faux et sans en "parler au défendeur et qu'en agissant ainsi, elle a ratifié "sans réserve les actes du défendeur qui pouvaient excéder

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“ les limites de son mandat, ce qui a eu pour effet de décharger le défendeur de toutes les responsabilités qu'il avait pu encourir.”

Ce raisonnement suppose que la demanderesse a reconnu Bastien comme son débiteur, qu'elle a agi librement, en l'absence du défendeur, et qu'elle acceptait quarante cents dans la piastre sans aucune réserve. Toutes ces suppositions sont contraires aux faits. C'est le défendeur présent qui l'engage à signer, parce qu'il vaut mieux avoir quarante cents dans la piastre que rien du tout. Elle répond qu'elle signera s'il est assez bon de lui payer la balance, et Chaurest ne refuse pas de le faire, mais il désire savoir, auparavant, s'il est responsable.

Comment est-il possible de trouver dans ces faits une *ratification* ou une *approbation* de l'acte que le mandataire a fait sans pouvoir, et l'intention d'abandonner tout recours contre le mandataire, de le décharger de la responsabilité qu'il avait encourue ? Car c'est là ce que signifie le mot *ratifier*.

“ Ratifier, dit Laurent cité par le défendeur, (Vol. 28, No 65), c'est consentir en approuvant l'acte que le mandataire a fait sans pouvoir. *Le consentement donné après l'acte équivaut au pouvoir* donné avant l'acte. En ce sens, on dit que la ratification équivaut au mandat.”

Le lendemain, après la mort de Bastien, la demanderesse s'est rendue chez le défendeur, lui demander le remboursement des \$1,200. Il lui répond: “ poursuivez-moi, si je suis responsable, vous ne perdrez rien. ”

La demanderesse donnait effet à sa réserve de la veille, et le défendeur se considérait si peu déchargé de sa responsabilité par la demanderesse, qu'il lui répond comme la veille, non qu'elle l'a déchargé, mais: “je vous paierai si la cour trouve que j'ai excédé mon mandat ou que j'ai agi avec imprudence”. Il ne nie, il n'admet pas sa responsabilité, mais il ne prétend pas non plus que la demanderesse l'a déchargé de sa responsabilité, quand il l'a engagé à signer, la veille, une offre de 40c, la somme payée devant toujours profiter à elle ou à lui-même, selon qu'il sera ou ne sera pas responsable vis-à-vis d'elle.

Pour ces raisons, je suis d'avis, et cet avis est partagé par mon collègue M. le juge Robidoux, de confirmer le jugement avec dépens.

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C. Laurendeau, pour la demanderesse.

H. Pelletier, pour le défendeur.

COUR SUPÉRIEURE.

ARTHABASKA, 13 juin 1906.

Présent :—MALOUIN, J.

BRUNELLE v. LA CORPORATION DU VILLAGE DE PRINCEVILLE.

Loi des licences de Québec—Opposition à la confirmation du certificat pour obtention de licence—Majorité des électeurs—Décisions laissées au pouvoir discrétionnaire des conseils municipaux—Recours de l'action en cassation pour cause d'illégalité—Pouvoir des conseils de retrancher de l'opposition les signatures de ceux qui ont signé les certificats.

JUGÉ :—1o. La question de savoir si une opposition écrite à la confirmation d'un certificat pour l'obtention d'une licence est formée, ou non, par la majorité des électeurs prévue par la loi, est une question de fait dont les conseils municipaux sont les juges souverains. Par suite, la solution négative qu'ils adoptent ne donne pas ouverture à l'action en cassation pour cause d'illégalité de l'art. 23 de la loi des licences, modifiée par la 3 Ed. VII, Cap. XIII, s. 3.

2o. Un conseil municipal est fondé à retrancher en bloc de l'opposition écrite à trois certificats, les signatures de tous ceux qui ont préalablement signé ces certificats, et n'est pas tenu de faire une élimination particulière pour chacun d'eux des signatures qui y figurent en même temps que sur l'opposition.

MALOUIN, J. :—

Le demandeur a intenté la présente action pour faire annuler et casser une résolution passée par le conseil de la corpo-

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ration défenderesse le 15 mars 1906, approuvant et confirmant deux certificats de licence, l'un en faveur de Balzam Talbot et l'autre en faveur de Amédée Boisvert, pour la vente de liqueurs spiritueuses dans les limites de la municipalité défenderesse.

Le demandeur invoque plusieurs motifs dans sa déclaration, mais à l'audition de la cause, il les a tous abandonnés, moins le suivant qu'il énonce comme suit dans son action :

“ Que la demande de confirmation des dits certificats aurait dû être refusée et rejetée par le conseil municipal de la corporation défenderesse, vû surtout que les dites demandes pour licence ont rencontré devant le conseil une opposition écrite de la majorité absolue de tous les électeurs résidant dans la municipalité de la dite corporation défenderesse.”

La défenderesse plaide en substance comme suit à cette partie de l'action du demandeur : “ Qu'il appert au procès-verbal de la séance qu'une requête a été présentée au conseil municipal à l'encontre de toute demande de confirmation, de certificat et spécialement des certificats Talbot, Boisvert & Desprès.” Le conseil de la corporation défenderesse examina la requête, fit une enquête et après mûre délibération, la rejeta, parce que dans l'opinion du conseil elle ne donnait pas satisfaction que la preuve qu'elle contenait la majorité absolue n'était pas faite à la satisfaction du conseil, mais qu'au contraire il était établi qu'elle ne contenait pas la majorité absolue ; que la requête en opposition était signée par quinze personnes qui avaient également signé les certificats de Talbot, Boisvert & Desprès, et ces signatures ont été rejetées par le conseil, vû qu'elles étaient contradictoires ; que le conseil examina ensuite la requête pour savoir si elle était signée par les électeurs résidant dans la municipalité, et dans le décompte fait, onze noms furent retranchés parce qu'ils n'étaient pas ceux d'électeurs municipaux de la municipalité ; qu'en agissant ainsi, le conseil de la corporation défenderesse a agi dans les limites de ses pouvoirs et sa décision est finale.

La preuve établit en effet que quinze électeurs qui ont signé les certificats de Talbot, Boisvert & Desprès, ont égale-

ment signé la requête en opposition. Ce fait, du reste, n'est pas contesté.

La prétention du demandeur, c'est que le conseil n'aurait pas dû retrancher en bloc ces quinze noms, mais aurait dû prendre en considération chaque certificat séparément et n'éliminer de la requête pour les fins de cette prise en considération que les noms qui se trouvaient à la fois sur tel certificat et sur la requête en opposition.

Il n'y a qu'une seule requête en opposition et à la manière dont elle est rédigée, il est facile de voir que le but visé par les requérants était d'empêcher l'octroi de licences pour vente de boissons spiritueuses dans la municipalité. C'était moins aux personnes que l'opposition était faite qu'aux licences. Le conseil l'a ainsi compris et a décidé de retrancher les noms des électeurs qui ont signé sur les certificats et sur la requête en opposition.

Après avoir retranché ces quinze noms pour le motif déjà donné, le conseil en a retranché onze autres, parce qu'ils n'étaient pas électeurs.

Sur ce nombre, le demandeur a admis à l'audition que neuf noms avaient été retranchés avec raison. Il conteste pour les deux autres, à savoir : Emilia Martineau et Dame François Boucher.

Emilia Martineau n'est pas sur le rôle, c'est Ophilia Martineau qui s'y trouve ; Dame François Boucher est sur le rôle, mais elle a vendu l'immeuble qui la qualifiait.

Sur la preuve de ces faits devant le conseil, ces noms ont été rayés de la requête.

D'après l'article 22 de la loi des licences, le certificat doit être refusé s'il est prouvé à la satisfaction du conseil, 3. "Que sa demande pour licence rencontre une opposition écrite de la majorité absolue de tous les électeurs résidents de la municipalité où il entend ouvrir une auberge."

Il faut qu'il soit établi, à la satisfaction du conseil, que la majorité absolue des électeurs résidents de la municipalité est opposée à la confirmation du certificat du requérant.

Le conseil était d'opinion et a décidé que la requête en op-

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position ne contenait pas la majorité absolue des électeurs résidents de la municipalité et l'a rejetée par résolution inscrite au procès-verbal de la séance.

Nous sommes d'opinion que le conseil a agi dans les limites de ses pouvoirs et que sa décision est finale.

La Cour d'Appel a décidé ces deux questions dans la cause de *Kearney vs Desnoyers et al.* (1) et nous adoptons sa manière de voir.

Voici ce que disait l'honorable juge Blanchet dans cette cause : "Il ne s'agit pas ici d'un appel qui nous permettrait de nous enquerir du bien ou mal jugé des commissaires, et nous autoriserait à réformer, modifier ou annuler leur jugement. Par le bref de prohibition, notre examen est limité à deux questions; les commissaires avaient-ils juridiction pour entendre et décider les demandes de White et celles des opposants et ont-ils, au cours des procédures qui ont été faites devant eux, excédé les pouvoirs qui leur sont conférés par la loi ?"

Comme la Cour du Banc du Roi l'a décidé dans cette cause de *Kearney vs Desnoyers et al.* il n'y a pas appel de la résolution du conseil confirmant un certificat de licence, sa décision est finale. Le recours accordé par la loi contre la décision du conseil est un recours en cassation pour illégalité. Le statut 3 Edouard VII, Chap. XIII, section 3 accordant ce recours, se lit comme suit : "La décision du conseil est, d'ailleurs, sujette à cassation, suivant les dispositions de l'article 100 et des articles 698 à 708 du code municipal." Et ces articles édictent qu'une résolution peut être attaquée pour illégalité.

Le conseil de la corporation de Princeville a-t-il excédé sa juridiction ou agi en violation de la loi en retranchant de la requête en opposition les quinze noms qui se trouvaient à la fois sur cette requête et sur les certificats ? En retranchant ces noms, le conseil a exercé une discrétion qui n'est certes pas entachée d'illégalité et qui ne peut être partant révisée par cette cour.

(1) 10 B. R. 436

Je crois même qu'il a sagement exercé sa discrétion. L'attitude de ces électeurs était contradictoire ; ils avaient d'abord signé les certificats et ensuite la requête s'opposant à l'octroi de toute licence. Le conseil a retranché leurs noms de la requête. Il a agi dans les limites de ses attributions, sa décision doit être respectée. Un cas analogue à celui-ci s'est présenté dans la cause de *Kearney vs Desnoyers et al.* et la cour a maintenu la décision de commissaires.

Examinons maintenant le cas d'Emilia Martineau. Emilia Martineau a signé la requête, elle a un immeuble dans la municipalité, mais elle n'est pas sur le rôle d'évaluation, c'est Ophelia Martineau qui s'y trouve. Le conseil a retranché le nom d'Emilia Martineau de la requête. Encore là, il a exercé sa discrétion qui ne peut pas être révisée. Pour être électeurs, il ne suffit pas d'être propriétaire, mais il faut de plus être inscrit au rôle.

Le cas de Dame François Boucher ne souffre pas non plus de difficulté. Madame Boucher était inscrite au rôle, mais elle avait cessé d'être propriétaire ; le fait a été établi devant le conseil. Pour être électeur, il ne suffit pas d'être inscrit au rôle, mais il faut de plus être propriétaire, locataire ou occupant. Art. 291 C. M.

La décision du conseil retranchant le nom de madame François Boucher de la requête en opposition doit être également maintenue.

Il a été établi devant le conseil que le nombre d'électeurs résidents à cette date était de cent cinquante-neuf, partant la majorité était de quatre-vingts. En retranchant vingt-six noms de la requête en opposition, il en restait soixante-quatorze, c'est-à-dire moins que la moitié.

L'action est renvoyée avec dépens.

A. Mailliot, procureur du demandeur.

Perrault & Perrault, procureurs de la défenderesse et mis-en-cause.

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ture, tels que fonds de terre et bâtiments qui sont dans le commerce, et non à un chemin qui n'est pas un héritage et qui ne tombe pas dans le commerce (792, 793 des Biens, Baudry-Lacantinerie ; Laurent, VII 130, Vo Servitude.)

Pour déterminer les droits des parties, il faut avoir recours à la loi en vertu de laquelle le chemin en question a été ouvert et particulièrement aux articles 771 et 772 C. M.

La corporation n'a pas fait de fossé de chaque côté du chemin en question, lors de son ouverture. C'était un manquement flagrant aux prescriptions de la loi, car il va sans dire qu'ouvrir un chemin dans un terrain bas, marécageux, humide, incliné comme était le terrain en question requérait et nécessitait la confection de fossés de chaque côté du chemin. C'était un besoin et une nécessité, suivant les termes de l'article 771 C. M. N'ayant pas rempli cette prescription de la loi, la corporation ne pouvait pas pratiquer de rigoles à travers le chemin, à moins que ce chemin fut bordé de fossés, car la condition de la construction de rigoles à travers un chemin est qu'elles puissent communiquer d'un fossé à l'autre, d'après l'article 771 C. M.

Pour égoutter le chemin, la corporation n'a pas eu non plus recours au mode indiqué par l'article 772, celui de creuser, s'il est nécessaire, un cours d'eau sur les biens fonds qui avoisinent le chemin.

Le résultat a été, que la chaussée du chemin servant de barrage aux eaux, elles s'accumulaient le long du chemin au nord-est d'icelui et y croupissaient ; puis elles finissaient par ronger, miner et détruire le chemin.

Pour éviter cette stagnation des eaux et le dommage en résultant au chemin, la corporation a pratiqué ces rigoles transversales au chemin.

Ces rigoles attirent naturellement les eaux du nord-est du chemin, celles du chemin et celles qui venaient s'arrêter au barrage ou chaussée du chemin et les font couler toutes ou pour la plus grande partie sur la propriété du demandeur qui en est inondée.

Les témoins de la défenderesse soutiennent que les eaux,

lors même que les rigoles n'auraient pas été faites, passeraient en aussi grande quantité sur la terre du demandeur, à travers le chemin ou en dessous du chemin.

Cette théorie est en opposition à la conduite de la corporation, qui a fait construire les rigoles, car pourquoi construire ces rigoles, pour faire passer l'eau, si l'eau passait aussi bien, aussi facilement à travers le chemin et en dessous d'icelui sans les rigoles ?

Les rigoles ont été évidemment faites, et sur ce point les témoins sont unanimes, dans le but d'égoutter le chemin et le protéger.

Sans ces rigoles, il est clair que les eaux se déversant maintenant par les rigoles sur la propriété du demandeur, y couleraient en moindre quantité parce qu'elles seraient ou retenues au nord-est du chemin par la chaussée ou qu'elles y seraient, d'après les règles élémentaires de la physique, en partie évaporées par l'action de l'air et du soleil, ou qu'elles seraient absorbées dans le terrain du chemin, sur tout le parcours du chemin qui a la largeur ordinaire, trente pieds sur quatre arpents. L'expert Cleveland, témoin de la défenderesse, admet lui-même la possibilité de cette théorie.

La corporation, en construisant le chemin sans fossés et sans rigoles, a fait sa position future vis-à-vis des propriétaires riverains, c'est-à-dire, que si la chaussée du chemin a servi de barrage aux eaux et a eu l'effet de retenir les eaux, comme dans le cas actuel, la corporation doit garder ces eaux et n'a pas droit de les faire écouler par des procédés artificiels sur la propriété du demandeur, car les fonds inférieurs ne sont assujettis envers ceux qui sont plus élevés qu'à recevoir les eaux qui en découlent naturellement, et sans que la main de l'homme y ait contribué (501 C. C.)

La corporation, ayant construit un chemin, elle doit garder toutes les eaux de ce chemin (Art. 711 C. M.) et les recueillir et faire écouler dans les fossés latéraux et, si ces fossés ne sont pas suffisants, elle a droit de faire creuser un cours d'eau sur les biens-fonds avoisinants.

La corporation n'a pas droit, de but en blanc *ex proprio*

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motu et sans adopter les procédés municipaux exigés en pareil cas; de jeter les eaux de son chemin sur les fonds des propriétaires riverains. Il lui faut de toute nécessité avoir recours au mode sage prescrit par le statut.

La corporation ne peut pas se retrancher derrière la raison que ce mode d'égoutter le chemin serait coûteux, car toutes les fois qu'une corporation ouvre un chemin, elle doit le faire suivant la loi, quelles qu'en soient les conséquences, et si elle ne le fait pas, elle s'expose à y être contrainte par les voies légales.

On conçoit que le coût des travaux, en pareil cas, pouvait être obérant pour une corporation nouvelle, mais après trente-deux ans, cette municipalité qui a pris de l'importance doit donner aux colons et aux contribuables tous les avantages et facilités qui résultent de la loi.

D'ailleurs, le mode légal est celui suggéré dans le présent cas par les deux experts de la défenderesse.

La cour croit donc que la corporation n'avait pas le droit d'ouvrir ces rigoles, vu qu'il n'y avait pas de fossés de chaque côté du chemin pour recevoir les eaux qui y passeraient; que le chemin ayant été fait de manière à retenir par sa chaussée, les eaux au côté nord-est la corporation ne peut légalement changer cet état de choses de la manière qu'elle l'a fait; que ces rigoles ont en l'effet de faire couler des eaux sur la propriété du demandeur dans la proportion d'un quart de plus qu'il n'en coulerait sans ces rigoles; que par ces rigoles, la corporation a créé une servitude ou a aggravé la servitude du fonds inférieur du demandeur et lui a causé des dommages en inondant une plus grande partie de son terrain, lesquels dommages la cour évalue à la somme de vingt-cinq dollars.

Le témoin Cleveland, expert de la défenderesse, appelé par cette dernière à visiter les lieux, a tellement compris que le demandeur souffrait de l'état de choses dont il se plaint, qu'il a suggéré à la corporation, dans son rapport par écrit, d'indemniser le demandeur en achetant une lisière de terrain qui serait prise sur le côté nord-est du chemin, sur le terrain de

Narcisse Thérien et de le donner au demandeur en compensation des dommages soufferts.

Pour ces motifs, la cour condamne la défenderesse à payer au demandeur la somme de vingt-cinq dollars avec intérêts, et la défenderesse est de plus condamnée à faire disparaître les dites rigoles ou à conduire les eaux qui en proviennent suivant les articles 771 et 772 C. M. ou de toute manière pour que les dites eaux n'affectent pas le terrain du demandeur ; le tout avec les dépens.

L. C. Belanger, C. R., procureur du demandeur.

Campbell & Gendron, procureurs de la défenderesse.

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SUPERIOR COURT.

SHERBROOKE, January 5th 1906.

Present :—HUTCHINSON, J.

LEDOUX v. LA MUNICIPALITÉ DU CANTON DE STE EDWIDGE DE CLIFTON.

Municipal law—Valuation Roll—Notice of deposit and of revision by the Council—Powers and discretion of Municipal Councils in revision of valuation rolls.

Held :—1o. Notice of the deposit of a valuation roll, under art. 732 M. C., and of its revision by the Municipal Council, under art. 736, may be given simultaneously by one and the same document, no interval of time being required to lapse between the two.

2o. Municipal Councils in revising valuation rolls have a discretion with which the Courts will not interfere by the exercise of their reforming power except in cases of evident injustice amounting to oppression.

HUTCHINSON, J. :—

A valuation roll was duly deposited with the Secretary-Treasurer of the municipality defendant on the 25th July, 1905, and on the same day the Secretary-Treasurer gave notice of

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the deposit and that on Monday, the 7th day of August, then next, at one o'clock in the afternoon, at the ordinary place of meeting, the Municipal Council would proceed to the examination of the roll, and that all persons interested were required to take communication of it at the office of the Municipal Council. The two notices were united and formed one document.

Under article 238 of the M. C., the notice required to be given before the Council could proceed to the examination and revision of the valuation roll, was seven clear days, and, therefore, more than seven days elapsed between the 25th of July and the 7th of August, and sufficient notice appears to have been given.

It is not by law necessary that any delay should elapse between the giving of the notice by the Secretary-Treasurer of the deposit of the valuation roll, and the giving of the notice of the day and hour when the Council will proceed to the examination and revision of the roll.

Although by article 756 of the M. C. this notice must be given by the Council, and in this case it was given by the Secretary-Treasurer, yet he was acting as the authorized agent of the Council, and the Council regarded it as legal and sufficient and acted upon it.

By article 16 of the M. C. it is provided : " That no objection founded upon form, or upon the omission of any formality even imperative, can be allowed to prevail in any action, suit or proceeding respecting municipal matters, unless substantial injustice would be done by rejecting such objection. "

Even supposing the formality respecting the giving of the notice was imperative, yet it is evident that no substantial injustice was done by reason of the manner in which it was given.

Under article 734 of the Municipal Code the Council is empowered to revise and amend the valuations of the valuers as shown by their valuation roll.

Although the increase made by the council of the valuations

made by the valuator as shown by the roll, and respecting the individual properties of the plaintiffs were considerable, yet it is reasonable to conclude that farm and other properties in the vicinity of a church, post-office, stores, and black-smith shops, are of considerably greater value than properties situated miles away, and, further, the proof shows that taking the bases fixed by the valuator, the valuations fixed by the Council were not too great or disproportionate, and no injustice seems to have been done by reason of the increase in the valuation of the respective properties belonging to the said plaintiffs, as made by the Council.

In the case of *The Corporation of the Parish of St Louis & Chouinard et al.* it was held as follows : " Municipal corporations are subject to the reforming power and control of the Superior Court, but they will not be judicially interfered with in matters left by law to their discretion, unless it is shown that a fraud or an invasion of private rights has been committed, or that palpable and manifest wrong has inflicted." And, further, it was held by the Court of Review in Quebec in the case of *Thériault vs The Corporation of the Parish of St Alexandre* : " That to authorize the Superior Court to judicially interfere in a matter like the present it is incumbent on the plaintiff to establish clearly either illegality, or at least such evident or grave injustice as would constitute an oppression, and would be indicative of bad faith. "

In the present case no such proof has been made, and the action should not have been taken before this Court, it is dismissed with costs.

J. Beaulne, for the plaintiff.

Saint-Pierre & Verret, for the defendant.

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SUPERIOR COURT.

[DOMINION CONTROVERTED ELECTIONS' ACT]

SHERBROOKE, May 26th 1906.

Present :—HUTCHINSON, J.

WETHERALL v. HUNT.

Dominion election laws—Election petition—Service—Judge's order—Domicile or residence of defendant—Preliminary objections.

HELD :—When an order was made by a judge for the service of an election petition “on the defendant in person, or at his domicile or at the place “ of his ordinary residence, speaking to a reasonable person belonging “ to the family of the defendant or by posting in a conspicuous place on “ the residence of the defendant, in the presence of a witness, the election petition and proceedings attached thereto”, a service effected at the residence of the defendant's father where his wife and children were temporarily residing, the defendant's house in which he had lived during the eight previous years not having been closed, is not in compliance with the order and on preliminary objection made thereto, will be declared null and void.

HUTCHINSON, J. :—

The petitioner alleges that an election for a member of the House of Commons of Canada, for the electoral district of Compton, in the judicial district of St Francis, was held in the course of the month of January last, 1906, and that the nomination of candidates was fixed for the 28th day of December, 1905, and took place on that date at Cookshire, in the electoral district of Compton, and the voting on the 4th day of January last, 1906 ;

That Aylmer Byron Hunt, and Rufus Henry Pope, farmer, of the Town of Cookshire, in the district of St Francis, were the candidates, and were put in nomination and that the returning officer for this election has declared Aylmer Byron Hunt to be elected member of the House of Commons of Ca-

nada for the electoral district of Compton, and has made his return in consequence to the Clerk of the Crown in Chancery for Canada, and has published a notice of the election in the Canada Official Gazette on the 27th day of January, 1906, in conformity with the law ;

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That the petitioner was a duly qualified elector and had the right to vote at the election, and his name was inscribed on the list of electors which was used at the election ; that he is still qualified to vote at an election of a member of the House of Commons of Canada ;

That the election was not made freely, and was not a free spontaneous expression of the opinion of the electors of the electoral district of Compton, but, on the contrary, the vote of the electors who voted in favour of the defendant was prejudiced and controlled by the fraudulent acts and manœuvres practiced by the defendant himself, by his agents whom he appointed to supervise and direct the expenses of the said election, and by other agents and persons in his name and his stead ;

And the petitioner prays that it be declared that the Aylmer Byron Hunt, by himself and by his authorized agents, and by partisans and friends with his knowledge and consent have been guilty of fraudulent acts and manœuvres forbidden by law, and that the election be declared irregular, illegal and null, and that the defendant be personally disqualified from voting or sitting in the House of Commons of Canada during the period fixed by law.

The defendant has met this petition by preliminary objections, and in support thereof sets forth in detail some nineteen reasons or objections; the 16th of which reads as follows :

“ Because even admitting the regularity and sufficiency of the
 “ said orders of the 16th and 26th days of February 1906,
 “ which the defendant does not admit, but on the contrary,
 “ denies the pretended service of the said petition and the
 “ other documents thereto attached, which was not made in
 “ accordance with the said orders or either of them, was not
 “ made upon the defendant in person, or at his domicile, or

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“ at the place of his ordinary residence at the Township of Bury, or in any way as required by the said order or orders, and the alleged and pretended service herein of the said petition and documents thereto attached was and is “ wholly irregular, illegal, null and void”, and it is upon the truth and sufficiency of this objection that the present contestation turns, the other objections being virtually not insisted or relied upon ; and the defendant reserving his right to contest the return or returns of the bailiff in the manner required by law, prays that the petition and contestation of election be declared to be irregular, illegal, null and void, and that it be rejected and be declared to be of no force or effect whatever, and that the defendant be not required to answer thereto and that no further proceedings be had upon the said petition, and that the same, with all the proceedings heretofore had, be set aside and rejected.

The two orders above mentioned were to the following effect, namely: “The one of the 16th of February merely extended the time for the service of the petition upon the defendant for the term of ten days,” and the order of the 26th of February was as follows : “Having seen and examined the above petition and the facts in support thereof, we the undersigned Judge of the Superior Court for the Province of Quebec, sitting in and for the district of St Francis, do grant the said petition, and order and direct that the service of the said election petition, and all other proceedings thereto attached, be effected upon the said defendant-respondent, Aylmer Byron Hunt, in person, or at his domicile, or at the place of his ordinary residence, at the Township of Bury, speaking to a reasonable person belonging to the family of the said defendant-respondent, Aylmer Byron Hunt, or by posting in a conspicuous place on the said residence of the said Aylmer Byron Hunt, in presence of a witness, the said election petition and all other proceedings thereto attached, and the further delay of fifteen days from this date is awarded the said petitioner to make said service as aforesaid.

On application of the defendant leave was granted by the

Court to contest the truth of the Bailiff's return, he having stated in his return that he had served the petition, and the said other documents, at the domicile of the defendant.

There is no doubt that the domicile and ordinary place of residence of the defendant for a period of nearly eight years, and up to the end of February last, 1906, was a place different from the place where the service of the petition, and all documents thereto attached, was effected.

On or about the last day of February, 1906, the defendant being away from his home, his wife and children (all of whom were small), and her servant girl, left their home and domicile and went to live for a few days with the father of the defendant, who was a widower, and his children no longer living with him, but who has a housekeeper, an adopted daughter, named Katie Smith, and she had gone for a few days to visit or live with the married daughter of the defendant's father, a Mrs Walsh, and it was the intention of the defendant's wife, her husband being absent, to keep house for a few days for her father-in-law, during the absence of his housekeeper, Katie Smith, and then return to her own home, which she did.

It was while the defendant's wife was at her father-in-law's house that the petition, and other documents thereto, attached, were served upon her, to wit : on the 5th of March 1906, and no service was made at the house first above mentioned, where the defendant and his family had resided, the residence of the defendant's father being across the river, and some few hundred yards from the defendant's house.

The defendant's wife did not remove her furniture, or other effects, from the house she had left, except a couple of high chairs for the use of the children, and the children's clothes, and a fire was kept going in the house for a greater part of the time, and during this time she went back occasionally to her house.

It is provided by article 79 of the Civil Code that "The domicile of a person for all civil purposes is at the place where he has his principal establishment;" and article 8 : "Change of domicile is affected by actual residence in an

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" other place, coupled with it the intention of the person to " make it the seat of his principal establishment; " and 81 : " The proof of said intention results from the declarations of " the person and from the circumstances of the case. "

" A temporary change of residence does not effect the " change of domicile. It must appear that the person has the " intention of remaining permanently at his new place of resi- " dence or of making it the seat of his principal establish- " ment ; " (see *Waldron vs Brannon*) (1) and "He who was " proved to have his domicile in the province is reputed to " have continued it there, although, even, he has gone to reside " elsewhere, if it is not proved that he has acquired a domicile " at his new residence." (see *Pilnik vs Numiginski*) (2).

" He who alleges a change of domicile must furnish proof " of it " and, further: "The facts ought always to be inter- " preted in the sense favourable to the preservation of the do- " micile. " (see 1 Duranton No 358).

Therefore from the circumstances of the case above men- tioned, it is evident that the domicile of the defendant, and his ordinary place of residence, was not the residence of his father, where the service of the petition, and the other docu- ments were made upon the defendant's wife, but, on the con- trary, the domicile and ordinary place of residence of the said defendant on the 5th of March last, when the alleged service was made, was the place where the defendant had re- sided during the past seven or eight years, and, therefore, that the service of the petition, and the other documents thereto attached was not made as required by the order of the 26th February, 1906, and, is therefore, irregular and illegal.

The contention of the petitioner that there was no preju- dice, and that article 174 of the Code of Civil Procedure should apply, cannot be accepted, as the statutes provide the mode of

(1) L. C. J. 268.

(2) 16 S. C. 231.

service to be followed, and, in case that cannot be done, it further provides that the service may be effected in such other manner as the Judge, upon application of the petitioner, directs. Every opportunity was given to the petitioner to make a service that would be legal, but he has acted contrary to the law, and prejudice is presumed.

I therefore declare the service of the petition, and the documents attached thereto, to be irregular, illegal, null and void and maintain the preliminary objections, and the petition and all the proceedings had in connection therewith, are hereby annulled, rejected and set aside, the whole with costs.

M. O'Bready, for the petitioner.

John Leonard, for respondent.

F. W. Hibbard, counsel.

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COUR SUPÉRIEURE.

QUÉBEC, 11 juin 1906.

Présent:—SIR C. A. P. PELLETIER, J.

BLOCK ET AL. v. CARRIER ET AL. & THE NORTH SHORE
POWER RAILWAY & NAVIGATION CO. def. en
garantie.

*Société commerciale—Dissolution par faillite—Demande de
cession sans autre procédure—Capacité d'une société
dissoute par faillite pour fins de liquidation—Recours
en garantie.*

JUGÉ:—Une demande de cession de biens à une société commerciale qui n'est pas suivie du dépôt par elle de la déclaration et du bilan prévus à l'art. 859 C. P. C., ni d'aucune procédure ultérieure, ne la constitue pas en état de faillite de façon à causer sa dissolution.

Une société commerciale dissoute par la faillite continue d'exister comme personne morale et peut agir comme telle pour les fins de sa liquidation.

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Dans l'un et l'autre cas, la société poursuivie est recevable à exercer les recours en garantie qu'elle peut avoir contre des tiers.

SIR C. A. P. PELLETIER, J. :—

La défenderesse, par sa motion de la nature d'une exception à la forme, allègue :

Que les demandeurs en garantie se désignent dans le bref de sommation en cette cause comme faisant affaires ensemble en société sous les nom et raison de Carrier, Lainé & Cie ; que la dite société est notoirement insolvable, en faillite et en conséquence dissoute ; que Charles Henri Carrier, l'un des demandeurs, est dans l'impossibilité de rencontrer ses paiements, est notoirement insolvable et qu'en conséquence la dite société a cessé d'exister ; que l'assignation est en conséquence insuffisante, irrégulière et illégale et que la défenderesse en garantie en souffre préjudice et demande que l'assignation soit déclarée irrégulière et nulle et demande le renvoi de l'action en garantie.

Les demandeurs en garantie répondent à la motion que, de fait, la Banque de Montréal leur a fait signifier une demande de cession de biens le 14 novembre dernier, mais que la société Carrier, Lainé & Cie n'a pas, jusqu'à cette présente date, fait cession de ses biens et que la requérante, pour cession de biens, n'a pas procédé depuis lors sur sa demande et qu'elle a sub-séquentement institué une action contre les demandeurs en garantie pour le montant de sa créance, pris jugement sur la dite action et exécuté par voie de saisie le jugement, laquelle dite exécution est encore pendante devant la cour. Les demandeurs admettent que le 18 novembre dernier la dite Banque de Montréal fit nommer un gardien provisoire aux biens personnels du dit Charles Henri Carrier, qui, sur la demande de cession, céda le 16 novembre dernier sa part indivise dans les biens de la dite société Carrier, Lainé & Cie, mais que la dite Banque de Montréal n'a rien fait sur cette demande de cession, laquelle elle semble avoir abandonnée. Les demandeurs plaident de plus que la présente action en garantie, de même que l'action principale en cette cause découlent directe-

ment de transactions faites par la dite société Carrier, Lainé & Cie avant la date de la dite demande de cession. Et plaident en outre que pour la liquidation des biens et les affaires de la dite société Carrier, Lainé & Cie et pour régler et poursuivre ses affaires non terminées et spécialement pour cette affaire et vis-à-vis de la défenderesse, la dite société n'est pas et ne serait pas dissoute et aurait encore le droit d'ester en justice; que les demandeurs ont été poursuivis comme associés par la demanderesse principale dès avant le mois de novembre dernier et les défendeurs principaux qui sont les demandeurs en garantie en cette cause, ont droit de porter la présente action en garantie en cette même qualité, et que dans tous les cas, la dite société Carrier, Lainé & Cie est et était composée, dès avant le 20 novembre dernier, des seuls demandeurs en cette cause.

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Ainsi la prétention de la défenderesse en garantie, par son exception à la forme, est que lorsque les demandeurs en garantie ont pris la présente action en garantie au nom de la société Carrier, Lainé & Cie, ils étaient notoirement insolvable, en faillite et conséquemment la dite société était dissoute et que l'assignation qui a été faite était insuffisante, irrégulière et illégale.

La preuve faite à l'enquête sur la présente motion établit que le 14 novembre 1905, la Banque de Montréal a fait une demande de cession aux demandeurs en garantie, la dite société Carrier, Lainé & Cie. Il a été prouvé que le 14 novembre 1905, la société Carrier, Lainé & Cie n'avait aucun billet en souffrance à la Banque de Montréal. Les billets sur lesquels la demande de cession a été faite n'étaient pas dus; ils ne sont devenus dus que le 17 novembre. La Banque de Montréal a abandonné sa demande de cession; aucun bilan n'a été déposé, ni préparé; aucune procédure n'a été faite et la demande de cession est ainsi de fait encore pendante. La banque, voyant probablement son erreur, renonça de fait à cette demande de cession et prit une action contre la dite société sur quatre billets qui sont devenus dus après le 14 novembre. A cette époque la banque ne pouvait réclamer qu'à

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peu près \$40,000. Subséquemment sur l'action qu'elle a intentée elle a obtenu jugement le 18 décembre pour \$125,000. Les billets sur lesquels la demande de cession a été faite ont été compris dans l'action et tous les autres billets sont devenus échus. Subséquemment au 14 novembre et à part l'action prise par la banque aucun créancier chirographaire ou privilégié qui avait des créances contre la société le 14 novembre, n'avait pris d'action contre elle. La société Carrier, Lainé & Cie, le et avant le 14 novembre, était en position de rencontrer ses échéances si elle eut été traitée comme elle l'avait été auparavant; si la banque n'avait pas fermé ses portes par sa demande de cession, qui, d'après la preuve, ne paraît pas justifiable, puisque Charles Henri Carrier, l'un des membres de la dite société entendu comme témoin de la défenderesse en garantie, a produit en cette cause un état de compte assermenté et préparé par le comptable de la société pour le conseil de famille, tenu dans le mois de novembre dernier, lequel état forme partie de l'homologation du conseil de famille et démontre un surplus, en faveur de la société de \$315,931. Malgré ce surplus la défenderesse en garantie a essayé de prouver que la société Carrier, Lainé & Cie est dissoute, parce qu'elle est en faillite et insolvable. Elle n'a fait entendre pour prouver cela que deux témoins: Leonard J. Webster, gérant de la Banque de Montréal et Thomas Meany, secrétaire de la compagnie défenderesse en garantie; mais ni l'un ni l'autre n'ose jurer que la compagnie Carrier, Lainé & Cie est insolvable et incapable de rencontrer ses obligations.

On pose à M. Webster la question suivante :

" Q.—Do you consider that Carrier, Lainé & Cie unable to meet their obligations ?

" A.—I did not say that.

" Q.—As far as you know—Well, I understood that, perhaps I made a mistake ?

" A.—I did not say that at all. I simply said the bank stopped making further advances on the 15th of November.

" Q.—Of course you cannot say if they are in a position or not to meet their obligations ?

"A.—So far as I know they are not."

L'autre témoin Meany parle dans le même sens. Je ne vois pas en tout cela une preuve suffisante pour maintenir que la maison Carrier, Lainé & Cie était insolvable et incapable de rencontrer leurs obligations. La Banque de Montréal a continué à correspondre avec les demandeurs en garantie depuis le 14 novembre et elle les a toujours adressés à MM. Carrier, Lainé & Cie comme par le passé. Pour établir la preuve que les demandeurs en garantie admettaient eux-mêmes qu'ils étaient insolvable et que leur société n'existait pas, lors de l'institution de la présente action et n'existe pas maintenant, on a produit en la présente cause un plaidoyer de C. H. Lainé dans une cause sous le No 1381 de la Banque de Montréal *vs* Carrier *et al.*, les demandeurs en garantie, dans lequel plaidoyer le dit C. H. Carrier alléguait que la dite société Carrier, Lainé & Cie n'existait pas lors de l'institution de l'action; que par la dite demande de cession, la société Carrier, Lainé & Cie se trouvait dissoute. Dans son témoignage en cette cause le dit C. H. Carrier explique d'une manière satisfaisante, je crois, pourquoi il disait dans ce plaidoyer que la société Carrier, Lainé & Cie n'était plus. On lui demande :

" Q.—Dans le plaidoyer que vos avocats ont produit dans une autre cause et qui est maintenant produit en la présente cause comme exhibit D3 il y est, au 3ième article dit, que la dite société Carrier, Lainé & Cie n'existait pas lors de la prise de l'action et n'existe pas maintenant. Voulez-vous dire comment il se fait que ceci a été plaidé dans cette cause ?

" R.—Il y avait eu une demande de cession faite et ayant cédé ma part, j'étais sous l'impression que la banque marcherait avec cette affaire-là et c'est la raison que j'ai invoquée dans ce plaidoyer contre la Banque de Montréal. C'est la Banque de Montréal qui a fait la demande de cession. J'ai la demande de cession suspendue au-dessus de ma tête et je ne sais pas ce qu'ils vont faire maintenant—D'ailleurs, ce plaidoyer du dit C. H. Carrier n'a pas été maintenu par la cour.

Je trouve bien dans la courte preuve faite par la défenderesse en garantie que par la demande de cession depuis abandonnée par la Banque de Montréal et par la poursuite prise

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par elle immédiatement pour un montant considérable sans donner le temps aux demandeurs de pourvoir au montant qui n'était pas même encore dû. La banque a mis les demandeurs dans un grand embarras et a été la cause de la suspension des affaires de la société. Mais je n'y vois pas la preuve que la dite société soit insolvable, ni dissoute. La société n'a pas été liquidée. La demande de cession est chose morte aujourd'hui. Il n'y a pas eu de curateur de nommé. La Banque de Montréal, ayant abandonné sa demande de cession, a pris subseqüemment un jugement contre la société, elle a même pris une exécution contre elle, et a reçu divers montants en à compte du jugement et il reste à démontrer par la liquidation que la société n'était pas insolvable lors de la demande de cession. L'état moral de la société existe encore tant qu'il n'y a pas de liquidation. La société, même dissoute, continue à exister comme personne civile pour les besoins de sa liquidation. L'article 1892 C. C. dit bien que la société finit, entre autres causes, par la faillite ; mais l'article 1897 C. C. dit aussi: " Le mandat et les pouvoirs d'agir pour la société cesse par la dissolution, excepté à l'égard des actes qui sont une suite nécessaire des opérations commencées. " Ainsi, en supposant même qu'il y aurait faillite réelle des demandeurs et qu'il y aurait dissolution de la société, la société Carrier, Lainé & Cie ayant été poursuivie par les demandeurs principaux O. Block *et al.* dès avant la demande de cession de la Banque de Montréal, dès avant la prétendue faillite, si elle croit avoir bon droit d'appeler la défenderesse en garantie, non seulement elle peut le faire au nom de la société, mais elle doit le faire dans l'intérêt de la liquidation et des créanciers. Son mandat n'aurait pas cessé à l'égard de la poursuite prise contre elle antérieurement à la prétendue faillite. Sa poursuite en garantie contre la défenderesse est une suite nécessaire d'une opération commencée.

La défenderesse ne souffre aucun préjudice par l'action telle que prise. En quoi cela fait-il une différence pour la défenderesse, la North Shore Power Railway and Navigation Company, d'être poursuivie par la société Carrier, Lainé & Cie ou par Carrier & Lainé faisant ci-devant affaires en société? Il n'y a pas

eu de curateur nommé à la prétendue faillite, qui alors prendrait les intérêts de la société en liquidation ? Ce sont les défendeurs à l'action principale tels qu'ils étaient, qui devaient prendre l'action en garantie et j'en vois aucun intérêt à la North Shore Power & Railway Co à soulever cette objection dans une action commencée avant la prétendue faillite.

La jurisprudence me paraît unanime à maintenir les prétentions des demandeurs en garantie.

2, Delangle, Société Commerciale, No 720, page 400.

“ De ce que la société relativement aux tiers est censée subsistante, lorsque la liquidation n'est pas faite et le partage opéré, il suit que toute action qui se rattache à la société doit être intentée devant les tribunaux du lieu où elle avait son siège.”

Attendu que cette société est censée exister entre les associés ou leurs représentants, tant que la liquidation n'est pas encore faite,—la même doctrine a été appliquée aux associés entre eux par l'arrêt du 18 août 1840.

“ Ainsi, pour les tiers comme pour les associés, la société, quoique dissoute, est réputée exister encore activement et passivement ; la seule modification que la dissolution amène dans leur position, c'est que dans le cas où une liquidation a été instituée, la durée de l'action contre les associés non liquidateurs est réduite à cinq ans.

Marcadé, Pont, 7 bis du No 1990 à 1995, page 808 :

“ La société dissoute continuant à exister comme personne civile pour les besoins de sa liquidation on peut dire *a priori* que par elle-même la dissolution ne modifie en aucune manière la situation et les droits des créanciers sociaux vis-à-vis de la société”.

“ No 1991. Il peut s'induire d'un arrêt de la chambre des requêtes que la réception par les anciens associés du compte de gestion du liquidateur mettrait fin à la liquidation, et par suite à l'existence de la personne civile. D'un autre côté il résulte d'un arrêt rendu en matière fiscale par la chambre civile, que c'est quand l'excédent d'actif a été réparti entre les intéressés que la société cesse réellement d'exister comme être moral.”

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Glasgow Bank vs Jas Arbuckle et al. (1)Block *et al.*

"Held:—Although a commercial firm be dissolved the mem-

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bers thereof are still partners for the liquidation of the

&

" affairs of the old partnership, and a writ of attachment in

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" compulsory liquidation against them as co-partners is well
" founded.

Sir C. A. P.

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Vide :—

Banque du Peuple de Halifax vs Gauthier (2)*Brasserie Beauport vs Dinan* (3)*Lemay vs Léveillé* (4)

Voir jugement du juge en chef Lacoste, à la fin de la page 194 et page 195 : "Mais après la dissolution de la société, la société continue à exister et son existence se prolonge jusqu'au partage définitif des biens entre les associés, c'est-à-dire jusqu'après la liquidation et le paiement des dettes. . . . et ce n'est qu'après, lorsque l'excédent de l'actif a été réparti entre les intéressés que la société cesse d'exister." (Delangle, 719, 7 bis Marcadé 1991).

Ainsi, pour toutes les considérations ci-dessus mentionnées, je suis d'avis que, en supposant même que la société Carrier, Lainé & Cie serait réellement en faillite, ce que je ne considère pas prouvé, la dite société avait droit de prendre son action en garantie telle qu'elle l'a fait, comme suite nécessaire de l'action principale commencée dès avant la prétendue faillite. Je suis d'avis que l'exception à la forme de la défenderesse en garantie n'est pas fondée et qu'elle doit être renvoyée avec dépens.

Pentland, Stuart & Brodie, pour les demandeurs.

Cusgrain, Lavery, Rivard & Chauveau, pour les défendeurs.

Fitzpatrick, Taschereau, Roy, Cannon & Parent, pour la défenderesse en garantie.

(1) 16 L. C. J. 218.

(2) 14 C. S. 18.

(3) 14 C. S. 284.

(4) 14 B. R. 187.

COUR DE RÉVISION.

QUÉBEC, 31 mai 1906.

Présents :—ROUTHIER, juge en chef, LANGELIER
ET SIR C. A. P. PELLETIER, JJ.

CARRIER 'v. LA CORPORATION DE LA
PAROISSE ST HENRI

*Procédure—Mandamus—Conditions où ce recours est ouvert.
Barrières sur chemin au croisement de chemin de fer—
Commission des chemins de fer—Sa juridiction exclu-
sive.*

JUGÉ :—1o Le concours de trois conditions est nécessaire pour donner le droit de procéder par voie de *mandamus*: (a) un devoir d'office impératif à remplir par un corps ou un officier public, (b) le refus de l'accomplir et (c) le défaut de tout autre recours pour remédier aux conséquences de ce refus.

2o. Une corporation municipale n'a pas le devoir impératif de faire disparaître des barrières placées sur un de ses chemins par le Gouvernement Fédéral à l'endroit où un chemin de fer de ce dernier le traverse. L'acte des chemins de fer 1903 donne à la commission des chemins de fer le pouvoir d'accueillir et de juger les plaintes qui peuvent être faites à ce sujet et cette juridiction est exclusive de celle des tribunaux ordinaires. Pour ces motifs, le recours du *mandamus* contre la corporation n'est pas ouvert.

LANGELIER, J. :—

Le demandeur a demandé à la Cour Supérieure de Québec un *mandamus* péremptoire, pour la contraindre à faire disparaître quatre barrières qui obstruent le chemin de front du rang St Jean-Baptiste, et la route de St Ferréol, dans lesquels il a besoin de passer.

La défenderesse a nié une partie des allégations du demandeur, et a plaide que ces barrières avaient été placées là par les autorités du chemin de fer du Grand Tronc, lorsqu'il a construit sa voie, il y a une cinquantaine d'années, et qu'elles sont maintenues pour la protection du public par le Gouvernement Fédéral, maintenant propriétaire de ce chemin de fer.

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La Cour Supérieure a renvoyé avec dépens la requête pour mandamus.

Les faits de la cause ne présentent aucune difficulté, mais elle soulève des questions de droit très importantes.

La route de St Ferréol conduit du chemin macadamisé au chemin du rang St Jean Baptiste. Ce dernier chemin est ouvert depuis très-longtemps, et la route St Ferréol a été verbalisée en 1894. La voie du chemin de fer les traverse tous deux à peu de distance de leur point d'intersection. La partie de cette route qui se trouve entre le chemin de fer et le rang St Jean Baptiste n'a été ouverte au public que l'été dernier. La raison pour laquelle elle ne l'a pas été plus tôt, c'est qu'au-delà de la voie du chemin de fer il n'y a que deux habitants: le demandeur et un nommé Beaudoin, et qu'ils pouvaient aller rejoindre le chemin macadamisé en passant par le chemin de St Jean Baptiste.

Ceci est nécessaire à dire pour faire comprendre les prétentions du demandeur, mais n'est pas, à mon avis, d'une grande importance pour la décision de la question qui nous est soumise. Car, que la route soit beaucoup ou peu fréquentée, le public a droit à ce qu'elle ne soit pas obstruée. Or, c'est incontestablement une obstruction très incommode, que la présence de quatre barrières qu'il faut ouvrir chaque fois qu'on veut passer, et le demandeur, qui demeure au-delà du chemin de fer, est obligé d'ouvrir deux barrières chaque fois qu'il veut sortir de chez lui, soit qu'il passe par la route St Ferréol ou par le chemin St Jean Baptiste.

Mais la défenderesse avait-elle le devoir impératif de faire disparaître ces barrières ? A-t-elle refusé ou négligé de remplir ce devoir ? Le demandeur n'avait-il aucun autre recours que le mandamus pour obtenir satisfaction ? Voilà les questions que nous avons à examiner. Car un mandamus ne peut être accordé que si ces trois conditions se rencontrent : devoir impératif, refus ou négligence de le remplir, absence d'autre recours pour obtenir satisfaction, (Code de Procédure, art. 992.)

Y avait-il un devoir impératif pour la défenderesse de faire

disparaître les clôtures dont se plaint le demandeur ? Cette question me paraît réglée par la nouvelle loi des chemins de fer (3 Edouard VII, ch. 58, sect. 23 et 184). D'après la section 184 aucune compagnie de chemin de fer ne peut faire de travaux de nature à obstruer une voie publique, mais si elle en fait, c'est la commission des chemins de fer qui a juridiction pour l'en empêcher, ou faire disparaître l'obstruction.

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D'un autre côté, d'après la décision de la Cour Suprême dans la cause du *Grand Tronc & McKay* ⁽¹⁾ cette juridiction est exclusive.

Il résulte de là que, non seulement la défenderesse n'avait pas le devoir impératif de faire disparaître les barrières dont se plaint le demandeur, mais qu'elle n'en avait pas le droit. C'est à la commission des chemins de fer que le demandeur devait s'adresser.

Même si la défenderesse eût eu le devoir impératif de faire disparaître ces barrières, il n'y aurait pas de mandamus contre elle, parce qu'elle n'a ni refusé, ni négligé de prendre les mesures nécessaires pour les faire disparaître. La correspondance produite au dossier montre que, dès que le demandeur s'est plaint au conseil de la défenderesse, celle-ci s'est mise en communication avec les autorités du chemin de fer Intercolonial pour faire disparaître les barrières, et que ces autorités lui ont promis d'y voir. Le demandeur a pris son mandamus sans leur donner le temps de satisfaire à sa demande.

Enfin, le demandeur n'avait pas le droit d'obtenir un mandamus, parce qu'il avait un autre moyen beaucoup plus efficace de se débarrasser de l'obstruction dont il se plaint: c'était d'enlever lui-même les barrières, s'il était sûr que le gouvernement n'avait pas le droit de les maintenir, et que quelqu'un pourrait les enlever sans le consentement des autorités du chemin de fer.

En vain, il dit que le droit de faire disparaître une obstruction ne peut être exercé que par celui qui a besoin de

(1) 34 S. C. R. 81.

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l'écarter pour passer dans un chemin public. Pourquoi la défenderesse aurait-elle plus de droit que lui,?

Pour ces raisons, je suis d'avis que le jugement qui a refusé au demandeur le mandamus péremptoire qu'il demandait a été bien rendu, et qu'il doit être confirmé avec dépens.

Belleau, Belleau & Belleau, pour le demandeur.

Bédard, Roy & Chaloult, pour la défenderesse.

COURT OF REVIEW.

MONTREAL, May 31st 1906.

Present :—ARCHIBALD, ROBIDOUX AND PARADIS, JJ.

PARISEAU v. DESMARTEAU ET AL.

Procedure—Motion for leave to contest truth of bailiff's return—Delay within which it should be made. Art. 226 C. C. P., 73d. Rule of Practice—Sale—Revendication of thing sold by unpaid vendor—Thing sold must be entire and in same condition.

HELD :—10. A motion for leave to contest the truth of a *procès-verbal* of seizure under art. 226 C. C. P. should be made at the earliest possible moment after its alleged falsity becomes known, and the delay of three days prescribed in the 73d. rule of practice touching irregularities, is a reasonable delay therefor.

20. The right of the unpaid vendor to revendicate the thing sold, provided in articles 1998 and 1999 C. C. is subject to the condition that it be still entire and in the same state as when sold. Timber sold to a dealer and delivered in his yard, though mixed in piles with his other stock, may still be entire and in the same condition as at the time of the sale.

The judgment under Review was rendered in the Superior Court, LYNCH, J., on the 23rd of June 1905, as follows :

LYNCH, J. :—

The plaintiff alleges that in the month of December, 1903 and in January, 1904 he sold to the defendant Lamarche nine

cars of lumber of various kinds, for about the sum of \$1,259.49, which were all delivered after the 2nd of January, 1904, seven into the yard of Lamarche, and two into that of the *mis-en-cause* Pauzé, who does not claim the ownership of the same; that about the middle of January, 1904, the defendant Lamarche made an abandonment of his estate for the benefit of his creditors and that the defendant Desmarteau was named provisional guardian; that the lumber which was to have been paid for on delivery was not so paid for within thirty days, and that in consequence he has a right to ask that the sale be rescinded and that he be put in possession of it; that it is still in the same state in the hands of the defendants and the *mis-en-cause*, who refuse to give it up to him; and he concludes that the sale be rescinded; that he be declared the owner of the lumber; that the attachment in revendication of the same be maintained.

The defendants after denying certain of the plaintiff's allegations, allege that Lamarche made his abandonment on the 23rd of January 1904, when the other defendant, Desmarteau, was appointed provisional guardian; that the latter was named curator on the 3rd of February following, and that on the 14th of March following, he was duly authorized to contest the present action; that the defendant Lamarche bought the lumber in question from the plaintiff about the month of February 1903, at a fixed price; that the lumber was to be delivered from time to time; that before the delivery of any part of it and up to the month of July 1903, Lamarche had paid the plaintiff over \$5,000.00 on account of the price; that the plaintiff had also received from Lamarche, in money and negotiable effects, the sum of \$4,500.00 on account of the price; that these negotiable effects were never returned to Lamarche; that the sale of the lumber was made on credit; that at the time of the attachment, the lumber was not entire, nor in the same condition as when delivered; that the sale was made nearly eleven months before the failure of Lamarche; that the attachment in revendication is unfounded and they conclude for its dismissal.

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A motion was made by the defendants, at the close of the *enquête*, for permission to contest the truth of the *procès-verbal* of attachment and to make the proof of its falsity which was objected to by the plaintiff on the ground that under the 73d. rule of practice it came too late. The defendants' counsel contended that the 73d. rule of practice applied only when the *procès-verbal* was attacked by reason of irregularities, but Art. 236 C. P., governs when the truth of the return of the bailiff is put in question and that is done by motion. Now, when should such a motion be made ? Presumably at the earliest possible moment after the alleged falsity becomes known, and the delay of three days mentioned in the rule of practice is a reasonable delay. The defendants should have taken this step at an earlier stage in the proceedings, and no reason is assigned why they did not move earlier. I shall dismiss the motion and reject the defence made under it with costs against the defendants.

The real issues may be narrowed down within very restricted limits. After the service of the writ, but just when does not appear, the defendants surrendered to the plaintiff the two cars of the lumber which had been placed in the lumber yard of the *mis-en-cause* Pauzé, so that we have only to deal with the remaining seven cars. Although the plaintiff in his declaration speaks of the lumber as so many cars of lumber, as a matter of fact, according to the evidence, the lumber was not in the cars when seized and had not been for some days prior thereto; it had been unloaded and piled in the yard of the defendant Lamarche, as it arrived on different days in the cars by which it was shipped. The defendants have not established the allegations of their plea that this lumber was purchased from the plaintiff by Lamarche in February 1903, and was paid for subsequently and prior to the abandonment. In February 1903, the plaintiff did not sell Lamarche any fixed quantity of lumber; he simply agreed to ship him lumber, when ordered, at stipulated prices for the various kinds so ordered. As the evidence offered by the parties was most

unsatisfactory and unintelligible as regards the quantity of lumber shipped by the plaintiff to Lamarche, and the condition of their accounts, it became necessary for the court to appoint a skilled accountant to examine their respective books and report thereon. A very satisfactory report has been made by Napoléon St Amour by which it clearly appears that at the date of the abandonment none of the timber mentioned in the plaintiff's declaration had been paid for. The bailiff who executed the writ simply transcribed in his *procès-verbal*, the description he found in the declaration ; and he further appointed the defendant Desmarteau as guardian *provisoire* and did not secure his signature as such to the *procès-verbal*. The seizure was apparently made in the most slipshod manner ; and there is absolutely nothing to show how much lumber was there when the seizure was made. Lamarche says that he used some of it between the dates when he received it and that of his abandonment ; but he is unable to say how much. As the cars arrived, they were unloaded, and the lumber put in piles in the most hurried manner, and these piles became covered with snow in the course of the winter. According to the report of Mr St Amour there should have been in Lamarche's yard, on the day of the abandonment, had he not used any of it, 14,000 feet of spruce, 44,876 feet of white pine, 10,744 feet of red pine and 14,000 feet of scantling ; that is, according to the plaintiff's statements rendered Lamarche, and which he had apparently accepted. Subsequently the parties agreed to sell and did sell the lumber which was supposed to come from the plaintiff with the result that 15,990 feet of spruce was so sold or 1,500 feet more than the plaintiff claims ; 51,500 feet of white and red pine, or 13,455 feet less than the plaintiff claims, and the 14,400 feet of scantling seem to have disappeared altogether. The plaintiff suggests, without saying so distinctly, that the total deficit of all kinds, 26,265 feet disappeared between the date of the abandonment and that of the sale, and, inferentially, that the estate must be held responsible. Such may be the case, but there is nothing in the evidence to warrant such an

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assumption. Can I say from this statement of facts that the lumber claimed by the plaintiff was entire and in the same condition as when it was delivered to Lamarche ? I must be prepared to give an affirmative answer, before I can say that the plaintiff is entitled to the full conclusions of his action. What do these words "entire and in the same condition" in Art. 1999 mean, as applied to this lumber ? Such, it occurs to me, is the one and only problem to be solved in this case. In the corresponding art. of the Code Napoléon the word "entire" is not to be found—so that the modern French authors treat the subject without reference to it. The whole subject was most ably and exhaustively dealt with by the late Chief Justice of the Superior Court Sir L. N. Casault in the case of *Thompson v. Dion & Mullin* ⁽¹⁾ in which he arrives at the following conclusion : " Il suit de ces citations que notre " Code Civil n'a fait, aux articles 1,999 et 2,000, que re- " produire les règles consacrées par la jurisprudence et par " la doctrine, en exigeant l'identité et l'intégrité pour la re- " vendication par le vendeur, de la chose vendue sans terme, " et pour sa collocation sur le prix de la chose vendue à " terme". In the case of *Brown vs Labelle* ⁽²⁾ one of the *considéran*ts of Mr Justice Cimon's judgment reads as follows :—" Considérant que les demandeurs n'ayant pas été " payés du prix de ces marchandises ainsi identifiées ont le " droit d'obtenir la résolution de la vente d'icelles, bien qu'elles " aient été déballées et que quelques-unes d'elles ne fussent " plus entières, le par. 2 de l'article 1999 ne s'appliquant " pas au cas actuel qui n'en est pas un de revendication". The inference being that had the action been one in revendication instead of one in resolution of the sale, the conclusion would have been different.

On the whole I think I am forced to the conclusion that the action cannot be maintained as to the lumber which was

(1) 11 Q. L. R. 273

(2) M. L. R. 2. S. C. 114.

seized in the yard of the defendant Lamarche, because it was not entire and in the same condition, as when delivered a part of it having been used by Lamarche and the remainder having become mixed with other lumber. As to the two cars of lumber which were seized in the yard of the *mis-en-cause* they were entire and in the same condition as when delivered, and the defendants recognized this by subsequently delivering it up to the plaintiff.

I am somewhat embarrassed as to the question of costs. The price of the lumber which was surrendered by the defendants to the plaintiff was \$221.36—the plaintiff clearly had the right to his action as regards, this particular lumber, which right was denied him by the defendants, until the moment of its surrender. The defendants must pay the plaintiff his costs on an action of that class up to the time of such surrender, and as the necessity for the appointment of an accountant arose entirely from the persistency of the defendants in claiming that Lamarche was not indebted to the plaintiff, they must pay those costs. The plaintiff's action, except as to the two particulars mentioned, will be dismissed with costs.

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JUDGMENT IN REVIEW.

ARCHIBALD, J. :—

The plaintiff's action is in revendication of nine cars of lumber sold by him in the month of August 1903 and in January 1904, to one Lamarche, for the sum of \$1259.49 and delivered after the 2nd of January, 1904, seven of the cars into his own yard and two into that of the *mis-en-cause*. About the middle of January 1904, Lamarche made an abandonment of his estate for the benefit of his creditors, and Desmarteau, the other defendant, was named provisional guardian and afterwards curator. The lumber was to have been paid for on delivery and was not so paid, and the plaintiff claims the right to rescind the sale and to revendicate the lumber, unless the defendant chooses to pay the sum of \$1,259.49 instead.

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The defendant alleges in substance that the sale of the lumber was made much earlier than the plaintiff alleges, and that portion of it had been mixed with the other lumber of Lamarche, and that it was not intact and in the same condition as when delivered and that the plaintiff's action in revendication is therefore unfounded.

The judgment of the Court below maintains the plaintiff's action to the extent of two car loads only, which were proved to have been delivered in the yard of the *mis-en-cause* and which were returned to the plaintiff during the pendency of the present action, and dismissed the balance of the plaintiff's action on the ground that the seven cars were not intact and had been more or less mixed with the other lumber of Lamarche. The remainder of the plaintiff's pretensions were maintained, but his action was dismissed on the ground that the right of revendication had been lost in consequence of the fact above mentioned.

It is proved that two car loads of the lumber were delivered in the yard of the *mis-en-cause*; that of the other seven cars, five were delivered in the yard of Lamarche during the month of January 1904, and the remaining two were only delivered after the appointment of the defendant as provisional guardian, and after he had made an inventory of the lumber in the yard.

It is also proved that the two car loads of lumber which were delivered in the yard of Lamarche after his assignment, were not entered in the inventory which Desmarteau, as provisional guardian, made of the insolvent's lumber; that at the time of making such inventory, the five car loads of the plaintiff's lumber which had been delivered before the assignment into the insolvent's yard, were made a separate and distinct item of the inventory, as lumber coming from the plaintiff; that when Desmarteau was appointed curator of the insolvent and called a sale of his assets these five car loads were excepted from the sale, but all the remainder of the lumber including the two car loads belonging to the plain-

tiff and not entered in the inventory were included in the assignee's sale made in the month of February ; that by agreement, the five car loads of lumber belonging to the plaintiff were sold on the 20th of March 1904 and realized the sum of \$639.57, which sum of money, under the agreement of the parties, was to take the place of the lumber.

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At the time of the general sale of the insolvent's assets in February, as well as at the time of the subsequent sale of the five car loads of the plaintiff's wood in March, the whole of the lumber was under seizure in the present cause.

The sale in February, as a part of the general assets of the insolvent, of the two car loads of lumber delivered after proceedings in insolvency, was unwarranted, and the defendant must, in consequence, account to the plaintiff for the value thereof, which, on the basis of the other values realized at the sale, amounts to the sum of \$288.96.

The *considérant* of the judgment in the Court below that the whole of the wood, as described in the plaintiff's action, was not to be found among the wood contained in the sale of the five car loads of the 30th of March, and, specially, an item of 14,400 feet which was in the report of the expert in this cause, called scantlings, and therefore was supposed not to be a part of the wood which was described in the bills of lading as *épinette*, or *pruche*, is erroneous, inasmuch as the scantlings were of *pruche*, as proved in the cause.

The identity of the wood sold on the 30th of March with the five cars of wood coming from the plaintiff is established, in the first place, by the *procès-verbal* of seizure uncontested; in the second place, by the laying aside of it by the parties in the case, as the wood coming from the plaintiff, and in the third place, by sufficient proof establishing such identity.

As to the two cars delivered after the proceedings in insolvency, no question whatever can arise.

The plaintiff ought therefore to have had judgment maintaining his action for the whole of the five cars, as well as for the remaining two cars sold by error as forming part of the general

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estate, by which error the defendant became responsible to pay to the plaintiff the price obtained for them.

We, therefore, think that there is error in the judgment of the Superior Court, and we reform it and condemn the defendant to pay to the plaintiff the sum of \$639.57, price realized for the five cars of lumber sold by the defendant with the plaintiff's consent on the 30th of March 1904, and the sum of \$288.96, value of the two cars of lumber belonging to the plaintiff sold by the defendant as a part of the general estate of the insolvent Lamarche, making altogether the sum of \$928.53 and we condemn the defendant to pay all the costs of the principal action as brought, and also the costs of Review.

Bernard & Chalifoux, for the plaintiff.

Bisaillon & Brossard, for the defendant.

SUPERIOR COURT.

MONTREAL, May 8th 1906.

Present.— ARCHIBALD, J.

ANGERS v. THE DOMINION TEXTILE COY, LTD.

*Contracts—Construction — Sale — Payment — Security —
 Conditional sale.*

HELD.—A contract by the acceptance of a proposal to purchase shares in a joint stock company for a price payable, half in bonds and half in preferred stock of a company to be formed, with a covenant that the shares purchased shall be deposited as security for the payment of the bonds and that so soon as all the shares of the company are so deposited and its real estate is transferred to the new company, a mortgage deed will be executed to secure the payment of the bonds, is a sale subject to a resolatory condition. In the event of the new company acquiring the property of the old one and mortgaging it to secure the bonds given in payment, the sale becomes complete and effective. In the event of such acquisition not being made, or being rendered im-

possible, then the consideration, viz, bonds secured by mortgage, failing, the sale is ineffective and subject to resolution at the suit of the seller.

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ARCHIBALD, J. :—

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This is an action to recover fifty shares of the Dominion Cotton Company. The *mis-en-cause* appeared in the record to abide by the judgment.

The plaintiff alleges that on and before the 29th of December 1904, he was the holder of fifty shares in the Dominion Cotton Mills Company ; that on the 29th of December 1904, the Royal Trust Company, as agent of a syndicate that was promoting the incorporation of the company defendant, intending to amalgamate four cotton companies previously doing business in Canada, sent the following circular letter to the shareholders of the Dominion Cotton Mills Co., to wit :
 “ To the shareholders of the Dominion Cotton Mills Co. Ltd.
 “ Dear sirs : The Royal Trust Company is authorized to
 “ make the following offer on behalf of a syndicate, of which
 “ Mr David Yuile is Chairman, which has been formed for
 “ the purpose of acquiring capital stock in the following companies :

“ The Dominion Cotton Mills Company, limited.

“ The Merchants' Cotton Company, limited.

“ The Montmorency Cotton Mills Co., limited.

“ The Colonial Bleaching & Printing Co., limited.

“ In accordance with the above authority, we offer to purchase shares of your company, namely, the Dominion Cotton Mills Company, Ltd, at 50% of their par value, and agree to pay for them as follows : 50% of the purchase price in 6% bonds and 50 % in 7% preferred stock of a new company to be formed. The shares of your company, which are deposited with us, will be held in trust as security for the payment of your bonds, and so soon as all the shares of your company are deposited and the real estate of the Dominion Cotton Mills Company, limited, transferred to the new company, a mortgage deed will be executed and registered by the new company against such real estate, to

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- “ secure the payment of your bonds, so that they will be
“ secured, not only by the assets of the new company, but
“ also by such real estate.
“ The issue of such bonds will be limited to the amount
“ required to pay for the stock to be bought in the four
“ above mentioned cotton companies. The issue of preferred
“ stock of such company will be limited to the amount requi-
“ red to pay for the stock to be bought in the four above
“ mentioned companies, plus \$500,000.00, which will be sub-
“ scribed for at par by the syndicate. The syndicate will also
“ invest \$500,000.00 in the common stock.
“ All shareholders wishing to avail themselves of the fore-
“ going offer, are requested to deposit their stock with us, in
“ order to receive, in exchange therefor, the securities above
“ mentioned, so soon as the transaction can be given effect.
“ All stock so deposited on or before January 10th 1905, will
“ be entitled to receive interest, as per above plan, from that
“ date.
“ As an earnest of their good faith and their ability to
“ carry out the undertaking, the syndicate have deposited to
“ our order, in the Bank of Montreal, the sum of \$1,000,000.00.
“ The bonds herein mentioned will be 6% twenty year bonds
“ redeemable any time, at the new company's option, at a pre-
“ mium of 10%. The preferred stock will be preferred, both
“ as to capital and dividends, which dividends will be non-
“ cumulative.
“ The proportions of payment to individual shareholders,
“ i. e. half in bonds, and half in preferred stock, will be adher-
“ ed to as closely as possible, but wherever equal distribu-
“ tion in this ratio is impossible, and fractions of bonds or
“ preferred stock arise, certificates for fractional parts of
“ shares and bonds will be granted, in order that the same
“ may be adjusted between the shareholders.
“ It is understood that the syndicate may withdraw from
“ the purchase of any of the stock deposited, should it not be
“ able to acquire a majority of the stock in each of the afore-

" said companies within thirty days from this date. (Signed)
 " The Royal Trust Company, Montreal, 29th December 1904."

Enclosed with the circular letter was a promise of sale in the following language : " We, the undersigned, shareholders
 " of the Dominion Cotton Mills Company, limited, hereby
 " agree to sell to the Royal Trust Company or its nominees,
 " the number of shares of capital stock in said the Dominion
 " Cotton Mills Company, limited, owned by us and set oppo-
 " site our respective names at any time within three months
 " from this date, at the price and on the terms and conditions
 " specified in the foregoing circular letter, and we hereby
 " constitute and appoint Hugh Robertson or A. E. Holt, of
 " the Royal Trust Company, our irrevocable attorney, with
 " power of substitution, with full power to transfer said stock
 " to the Royal Trust Company or its nominees, and to recei-
 " ve from it the securities to which we are entitled under the
 " provisions of the said circular letter in exchange for such
 " stock, and to grant the said The Royal Trust Company a
 " full discharge therefor ; and we hereby ratify and con-
 " firm all our said attorney or his substitute may do in vir-
 " tue hereof.

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" We further agree on demand to sign all such other docu-
 " ments as may be deemed necessary to give effect hereto.

" Witness our hands at the place and at the date set oppo-
 " site our respective names" and then following was an indi-
 cation of name and place, date, number of shares and of sig-
 nature of witness.

The persons composing the syndicate mentioned in the do-
 cuments above recited were promoting the incorporation of
 the defendant company.

The plaintiff, on the 11th of January 1905, signed the above
 mentioned promise of sale for his fifty shares of Dominion Cot-
 ton Mills stock and put the certificates for them into the pos-
 session of the Royal Trust Company, under the trust and for
 the purposes mentioned in the documents above recited ; the
 defendants, prior to the 11th day of January 1905, determined
 to carry out the terms of the trust and to limit the bond is-

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sue, as set forth above, and determined to date the bonds on the 1st of March 1905 to mature March 1st 1925, and to bear interest at the rate of 6% per annum, secured in principal and interest by hypothec upon the immovable property of the Dominion Cotton Mills Company, limited.

The plaintiff further alleges that the defendants have refused to deliver to him in payment of the purchase price of his stock, bonds such as referred to, but have only offered bonds which are not mortgage bonds, and are not secured by mortgage upon the property of the Dominion Cotton Mills Company; that on the 27th of January 1905, the Royal Trust Company acting as agents of the defendants, withdrew the offer to purchase further stock in the Dominion Cotton Mills Company, limited, on behalf of the syndicate above mentioned, but continued to purchase stock on the same conditions on behalf of the defendant company itself, up to and including the 8th day of February 1905; stating at the same time that after that date they would not acquire any further stock; that thereby, the defendants failed to put themselves in a position to acquire the stock of the Dominion Cotton Mills Company, and thereby failed to be in a position to gain possession of its immovable property, or to mortgage or hypothecate the same, and the plaintiff prays that the defendants be condemned, within fifteen days of the judgment, to deliver to him mortgage bonds of the defendants registered on the property of the Dominion Cotton Mills Company, limited, of the par value of \$1,250.00 and preferred stock of the company of the par value of \$1,250.00 and in the event of the defendants not delivering such bonds and stock, that the sale from the plaintiff to the defendants of the fifty shares of the stock of the Dominion Cotton Mills Company, limited, be set aside and the defendants be condemned to re-transfer the shares to the plaintiff, and in default of the defendants, within the said delay, conforming to either of the demands, that they be condemned to pay to the plaintiff the sum of five thousand dollars (\$5,000.00) the par value of the fifty shares, with interest from the 11th day of January 1905; that the *mis-en-cause* be

ordered to make such entries in their books, and to issue such certificates of other documents and do such other acts as may be necessary to carry out the order of the Court.

The defendants pleaded denying any part of the plaintiff's declaration which would render them liable to the plaintiff's conclusions; admitting the transaction such as set up by the plaintiff, but denying that they ever had any obligation to deliver bonds to the plaintiff registered upon the real estate of the Dominion Cotton Mills Co., Ltd, unless and until all the stock of the company was transferred to the defendant company; that the defendants have always been ready and willing to deliver mortgage bonds, but have been unable to secure all the stock of the Dominion Cotton Mills Co, Ltd, although they have made every effort to do so ; that they are therefore not in default to comply with any of the provisions of the circular letter of the 29th of December, 1894, and the plaintiff's action is unfounded and the defendants ask for its dismissal.

At the trial the defendants moved to amend their plea by adding "but notwithstanding the efforts which they had made " to acquire all the shares of the Dominion Cotton Mills Co., " down to the present time, which efforts they are still making, " they have as yet been unable to acquire all the shares of the "Dominion Cotton Mills Company, Ltd, owing to the opposition " of certain persons owning shares in the said company." This motion I rejected at the trial on the ground that the issue between the parties was to be determined entirely by the interpretation of the documents, and that the reason given in the motion why the shares of the Dominion Cotton Mills Company, Ltd, had not been obtained could not alter the contract between the parties resulting from the documents produced.

It is seen then that the issue between the parties is as to the nature of the obligation, as to the mortgage bonds which were to be paid for half of the price of the plaintiff's stock. Whether there was an absolute obligation to pay for the plaintiff's stock in such mortgage bonds, or whether that obligation was only conditional upon the defendants' acquiring the

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whole of the stock of the Dominion Cotton Mills Company, Ltd, and whether that condition was affected by the notice sent by the defendants through the agency of the Royal Trust Company, indicating that after the 8th day of February no further stock of the Dominion Cotton Mills Co. would be acquired by the defendants.

Another question also arises whether in the event of it being held that the obligation to give mortgage bonds was only a conditional one, that condition was not a condition resolutory of the proposed sale of the plaintiff's stock to the defendants. The question is to be answered by the construction of the whole language in all of the documents above recited together with the terms of the bonds proposed to be given to the plaintiff in part payment of the plaintiff's stock in the Dominion Cotton Mills Company, Ltd. The language of the bond as contained in the trust deed, so far as it is material to cite it, is as follows : " This bond witnesseth that
 " the Dominion Textile Company, limited, is indebted for
 " value received to the bearer hereof in the sum of \$
 " in gold coin of the present standard of weight and fineness
 " which said sum, the said company hereby promises to pay
 " to the bearer hereof or if registered to the registered holder
 " hereof at the office of the Royal Trust Company in the City
 " of Montreal on the first day of March 1925
 " this bond is issued in conformity to and in accordance with
 " the provisions of by-law No 17 of the company. and
 " is secured *pari passu* by trust deed of hypothec and pledge,
 " executed before R. A. Dunton, the day
 " of 1905, whereby certain property,
 " assets and undertakings of the company are hypothecated
 " and pledged in favor of the Royal Trust Company as trustee,
 " to which deed reference is hereby made for description
 " of the property and effects pledged or hypothecated, the nature
 " and extent of the security and the terms and conditions
 " upon which the bonds are so issued and held ; the same
 " property is subject to the lien of a prior deed of trust dated
 " 28th December 1895, securing 271,200 pounds sterling

"4½% first mortgage bonds, maturing first January 1916,
 "and deed of hypothec and trust dated 4th July 1902 secu-
 "ring a total issue of \$3,700,000.00, 6% second mortgage bonds
 "maturing 2nd July 1922. "

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It is seen then that the bond which has been engraved and which is offered to the plaintiff in part payment of his stock is a bond which has upon its face a statement that it is a mortgage bond secured by hypothec on certain real estate, namely the same real estate which was then secured by first and second mortgage bonds of previous issues.

The circular addressed to the plaintiff as one of the shareholders of the Dominion Cotton Mills Co., limited, on the 29th of December 1904 after reciting the quality in which the trust company was acting, and the persons for whom they were acting, and the objects which these persons had in view, continues : " In accordance with the above authority *we offer to purchase* shares of your company, namely, The " Dominion Cotton Mills Company at certain prices". Then, in the next paragraph it is indicated that the shareholders may deposit their shares with the Royal Trust Company, and then proceeds to explain what will be done with those shares in the event of the shareholders depositing them.

It will, however, before considering further the particular words contained in that circular, be well to look at the terms of the promise of sale which was enclosed with the circular in question by the Royal Trust Company to each of the shareholders of the Dominion Cotton Mills Company ; keeping in mind the language already cited from the circular, namely "*we offer to purchase.*" The promise of sale is in the following language: " We the undersigned shareholders the Dominion " Cotton Mills Company, Ltd, hereby agree to sell to the Royal " Trust Company or its nominees the number of shares of capital stock in said the Dominion Cotton Mills Company " owned by us at any time within three months from this " date", then follows the price and mode of payment, such as are described in the circular above referred to, and then follows the appointment of an agent by each shareholder who

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deposits his stock, authorizing that agent to transfer the stock deposited to the Royal Trust Company or its nominee, on receipt of the payment provided for in the circular letter.

With regard to this document it will be well to keep in mind the expression "agree to sell at any time within three months from this date", the date of course meaning the date on which any shareholder would deposit his shares. As a matter of fact, the shares of the plaintiff were deposited on the 11th of January 1905, and his promise of sale then would mean that he was willing to sell at any time within three months from that date, his shares for the price mentioned in the circular of the 29th of December 1904.

Turning again to the circular in question, the statement of the price to be given by the defendant for the shares of the Dominion Cotton Mills Company is 50% of their par value, to be paid for, 50% of the purchase price in 6% bonds, and 50% in 7% preferred stock, of a new company to be formed. Here the word "bonds" is in no way qualified, and doubtless any obligation of the company to pay money authorized by a by-law of the company would be within the meaning of the word bond. But, in the latter portion of the same circular, the following is added : "So soon as all the shares of your company are deposited and the real estate of the Dominion Cotton Mills Company, limited, transferred to the new company, a mortgage deed will be executed and registered by the new company against such real estate to secure the payment of your bonds, so that they will be secured, not only by the assets of the new company, but also by such real estate". This clause clearly indicates that it was the intention of the defendant, by the use of the word bonds in the description of the mode of payment of the price, to indicate mortgage bonds, and it is contended, on the part of the plaintiff, that the words "so soon as" in connection with the execution of the mortgage to secure bonds, really implied a term and not a condition, and that in consequence the defendants undertook to secure all the stock of the Dominion Cotton Mills Company, limited, and to execute the mortgage in question.

It seems to me that this view is untenable. Where the time within which an obligation is to be performed is not only not certain, but depends upon an event, the occurrence of which may never happen, we are in presence of a condition and not a term. The whole tenor of the documents indicates that the obtaining of the whole of the stock of the Dominion Cotton Mills Company was not contemplated as a certainty; it depended upon the whim of persons other than the defendants. It may be said that the defendants could undoubtedly, by offering a sufficient price, procure the stock, but everything indicates that there was no intention on the part of the defendants or of the syndicate which represented them, to offer any terms to one stock-holder which were not offered to another. So clear is it that the defendants did not intend to guarantee that they would procure the whole of the stock, that they actually stipulated in the circular in question that in the event of their failing to secure more than half of the stock of each of the four companies in question, that they would be permitted to withdraw from the transaction. It cannot then, I think, be said that the defendants guaranteed that they would procure the whole of the stock.

But the question as to whether the completion of the contract of sale between the plaintiff and the defendants did not depend upon the condition of the defendants obtaining the whole of the stock and executing such a mortgage is a totally different one.

As above observed, the Royal Trust Company offered to purchase. The plaintiff promised to sell within three months from the 11th of January 1905, i. e., up to the 11th of April 1905. He promised to sell upon the conditions named in the circular of 29th December 1904. He constituted an attorney whom he authorized to represent him in such a sale. Things have remained from the date of the deposit of the shares on the 11th of January in the same condition in which they were on that day. The plaintiff's attorney, named in his promise of sale, has done no act to change the status of the parties. Certificates of preferred stock to the extent of \$1,250.00 and

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bonds to an equal value have been deposited with the Royal Trust Company for the purpose of being offered in payment of the plaintiff's shares, and they have been offered in payment, and the plaintiff has refused them, as not being mortgage bonds, as was intended by the circular.

The question then is : is the plaintiff to be considered as having agreed to sell his shares and to take his risk of getting his bonds in payment of his shares guaranteed by mortgage ? Or is he to be considered as having offered to sell his shares upon receipt of the mortgage bonds in question together with the preferred stock in question ?

That no sale was in effect made on the 11th of January is evident from the language used in the promise of sale, i. e., it is itself called a promise of sale, and the shares themselves are not delivered over to the purchaser, but are put in the possession of an attorney who is appointed by the vendor, and only to be delivered to the purchaser when the corresponding obligations of the purchaser are complied with. Have these obligations ever been complied with ?

The question might be asked what sort of a bond did the defendants intend to give ? And that is answered on the very face of the bond which they passed by by-law, and which they lithographed and which offer they offered to the plaintiff, that bond expresses that it is a mortgage bond, and a mortgage bond, to be enregistered upon the real estate of the Dominion Cotton Mills Company, that is to carry mortgage subsequent to two other bonds issued on the same property. Manifestly the bond is wholly incomplete in the condition in which it was offered to the plaintiff. It even expresses the name of the notary who was to pass the deed of mortgage by means of a trust deed, but only the date when such trust deed is to be passed, has to be left in blank, as it never was passed. It says also that reference is to be had to such deed for a statement of the property hypothecated. Plainly then, the bond is not the bond that either the plaintiff or the defendants expected was to be given for the price of the property.

Proof was made that the bonds offered in the condition in

which they are, were worth approaching par, but that is really nothing to the point. The question is: Is the bond offered the bond which was contracted for? That question, it appears to me, can only be answered in the negative. No other ground for the plaintiff's action is alleged in his declaration, although by a written argument set before me, a new ground is set up, namely, that by the trust deed relating to the bond in question, the trustee is obliged, so soon as the mortgage securing the bonds is executed and registered, to release the stock of the Dominion Cotton Mills Company to the defendants; that course would be in direct contravention of the circular of the 29th of December under which the plaintiff's shares were deposited as follows: "The shares of your company which are deposited with us will be held in trust as security for the payment of your bonds. . . . so that they will be secured, not only by the assets of the new company, but also by such real estate."

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There are also many provisions in the trust deed relating to the bond in question, which more or less seriously interfere with the rights which bond-holders would have had in law, for other protection in connection with the affairs of the company issuing the bonds.

I am clearly of opinion that the plaintiff was not obliged to accept the bonds offered by the defendants; that they are not the bonds which the circular called for, and that as the plaintiff in the promise of sale which he made to the Royal Trust Company, Ltd, undertook to transfer his shares to it or to its nominee, at any time within three months from said 11th of January 1905, and that time being now expired the plaintiff is entitled to have his shares returned absolutely, but as, by his declaration, he offers still to receive the bonds actually agreed upon by the parties, and the preferred stock in question from the defendants within fifteen days of the judgment to be pronounced, judgment will go condemning the defendants to return to the plaintiff his fifty shares of stock in the Dominion Cotton Mills Company, limited, unless within fifteen days from the date of the judgment, they cause bonds to be

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issued and registered against the property of the Dominion Cotton Mills Company, limited, and deliver the same together with the preferred stock of the defendant's company to the plaintiff, and in the event of the defendant neither delivering the bonds and preferred stock to the plaintiff within the delay, nor yet returning to the plaintiff his fifty shares of Dominion Cotton Mills stock, the defendants will be condemned to pay to the plaintiff the sum of \$5,000.00, par value of the shares, with interest from the date of the judgment and costs of suit.

Béïque, Turgeon & Béïque, for the plaintiff.

Brown, Sharp & McMichael, for the defendant.

SUPERIOR COURT.

MONTREAL, April 14th 1906.

Present :—ARCHIBALD, J.

MEUNIER DIT LAGACÉ v. LAURIN ET AL.

Contract of lease—Lease of farms—Lease for share of produce with agreement by lessee to pay half value of stock, etc—Nature of contract—Contracts bonæ fidei—Rescission—Discretionary power of Court—Obligations of lessee—Remedies for non fulfilment.

HELD:—10. A lease of a farm for a share of its produce and an undertaking by the lessee to pay the lessor one half the value of the stock and agricultural implements on it, partakes of the nature of a partnership and is essentially a contract *bonæ fidei*. In adjudicating upon a demand by the lessor based upon charges of neglect and of maladministration by the lessee, the Court has a full discretionary power, in its appreciation of the facts, to declare whether the case comes within any of the provisions of Art. 1624 C. C., as to rescission.

20. While the failure of the lessee to carry out the stipulations of the lease entitles the lessor to ask for its rescission when it is of a grievous character, the Civil Code provides another remedy for acts of negligence

or omissions which are involuntary rather than the result of incapacity or of a refusal to perform the obligations of the lease.

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This is an action by the plaintiff to set aside a farm lease. The plaintiff alleges that on the 28th of September 1903, he leased to the defendants for a term of nine years a certain farm in the lease described, upon the terms therein stated.

The plaintiff further alleges that it was stipulated that the defendants should divide equally all the products of the farm, as well in hay, straw, grain, potatoes, vegetables, apples and the produce and increase of animals such as horses, cows, pigs, fowls, saving the reserve mentioned in the lease ; that it was specially agreed that so far as regards anything sold from the property that division should be made immediately after each sale ; that it was stipulated that the lessees should have the right to put an end to the lease at the expiration of two years to be counted from their taking possession. Then, it was alleged that the defendants had, as a matter of fact, put an end to the lease at the expiration of two years and had consented to its cancellation ; that besides, the defendants have given the plaintiff reason to demand the cancellation of the lease and to retake possession of the property leased in consequence of their omission to perform the obligations stipulated to be performed by them, to the great damage of the plaintiff who specializes his allegation as follows : that the defendants refused to make the division of the produce of sales by them made ; that the defendants refused to cut the straw and hay for the animals as they were obliged to do by the lease ; that the defendants refused to let the plaintiff take the potatoes of which he had need for his family, as stipulated in the lease ; that the defendants refused to take care of the fences, ditches, roads and buildings on the property leased and to whitewash the barns, gates, and to cut the weeds and the branches along the fences, as stipulated in the lease ; that the defendants refused and neglected to give any account to the plaintiff of a considerable quantity

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of cucumbers, butter-beans, tomatoes, cabbages, corn, apples and onions used by their families which he estimated at the sum of \$68.00 ; that he had delivered to the defendants a large number of milk cans and they had through negligence lost a number of them to the value of \$18.00 and refused to replace them ; that the defendants took possession of a large *cure* containing about 3,000 gallons of water which was upon the premises leased, and broke and destroyed it, which was of the value of \$15.00 ; that the defendants broke and destroyed an express waggon which was of the value of \$25.00 ; that they refused and neglected to whitewash the barns and gates, which work was worth \$20.00 ; that the defendants allowed a quantity of straw worth \$10.00 to be destroyed by their negligence ; that the defendants took a piece of fence away from in front of the house which was worth \$7.00 ; that the defendants allowed a quantity of apples and potatoes to be destroyed by leaving them on the field where they became rotten, to a value of at least \$20.00 ; that the defendants cut a number of seed apple-trees, and used the wood for their purposes, of the value of \$5.00 ; that the defendants refused and neglected to make the ditches and fences and to cut the weeds along the fences, work which the plaintiff was obliged to do in part, and which costs at least \$50.00 ; that the defendants have neglected to keep the fences in good order and it will cost \$20.00 to restore them ; that the defendants used the horses and carriages of the plaintiff for other things besides the work of the farm to the amount of \$10.00, for which they never rendered any account to the plaintiff ; that the defendants have taken care of and fed horses and animals belonging to strangers with the grain and hay of the plaintiff, without rendering account thereof ; that the defendants, by omission to cut the straw and hay as stipulated in the lease, caused considerable damage to an amount of at least \$100.00 ; that the defendants allowed a shed to be broken down under the weight of snow of a value of \$5.00 ; that the defendants had broken a harrow and sleigh which were under the shed ; that the defen-

dants did not do the work of the farm in proper time and did not do the ploughing in the autumn of 1904, which was a great damage to the plaintiff ; that the plaintiff has been obliged to make a considerable number of arpents of drain, seeing the refusal and negligence of the defendants to do the same, which was absolutely necessary for the draining of the said property ; that the defendants make an immoderate use of liquor and the plaintiff prays the rescission of the lease both on the ground that the defendants had consented to such rescission at the end of two years, and in consequence of the failure of the defendants to do the works above mentioned, and for condemnation of the defendants in the sum of \$532.00 for the damages which the plaintiff above sets forth.

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The defendants plead denying the allegations of the declaration with certain exceptions alleging that they have faithfully accounted for all their transactions, and with regard to the cutting of the hay and straw, the defendants allege having represented to the plaintiff that the animals did not eat the straw that was cut, and that it was also the custom among the farmers not to cut the straw and that the plaintiff recognized that the defendants were right and consented that after that, the defendants should not cut the straw, and that in consequence the animals were better off, as the plaintiff himself admitted.

In answer to the allegation concerning drains, the defendants state that the plaintiff declared to them that he did not know what was his part of the ditches; and the defendants further say that they were not bound to make new ditches: that the ditches which had existed on the said property were entirely filled up and the defendants did not think they were obliged to remake them.

As to the fences, the defendants say that they were stone fences which were in places entirely down and they were not obliged to put them in better condition than they were when they took possession of the premises.

As to the use of vegetables, the defendants say that they did use some vegetables for their family, but that the plaintiff

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used as much and the matter was tacitly settled between them.

The defendants further say that all matters relating to the lease were settled up to the 19th of December 1904 by notarial act.

With regard to the use of the horses and vehicles for work not connected with the farm, one of the defendants admits that he had used them on one occasion to carry the goods of his son-in-law into the city.

Upon these issues the parties came to proof, and I ruled that without a commencement of proof in writing, the plaintiff could not examine witnesses as to the consent of the defendants to give up the lease at the expiration of the two years. The defendant Antoine Laurin examined did not furnish a commencement of proof requisite, thus that portion of the plaintiff's action fails.

With regard to the different omissions and refusals to comply with the terms of the lease, many of them are on their face exceedingly unimportant, and many of them are not established by the proof. What may be considered the more important ones relate to the accounting for the different sales and the care of the farm, making of the ditches, cutting of weeds and white-washing the barns and gates.

The lease itself is of a somewhat peculiar character. Of course, the farm itself was the property of the plaintiff, and at the time the lease was made, there were upon it certain agricultural instruments and also some thirty cows and several horses. These were valued, and the defendants agreed to pay the one-half of the value of all the animals and agricultural instruments which were upon the farm. From that point of view, the defendants undertook to pay a considerable sum of money, the greater portion of which has been already paid. Thus it will be seen that the contract is not wholly a contract of lease. The element of partnership enters into it very strongly. It is not entirely what is called in article 1603 "*bail à cheptel*" which is there defined to be a contract of lease mixed with a contract of partnership, and which is again referred to

in article 1698, as being a lease by which one of the parties gives to the other a herd of cattle to take care of and feed, under certain conditions as to the division of the profits between the parties. It appears to be rather what is called a "bail à métairie" with a *cheptel* added to it. Indeed in the present instance there is very little to distinguish this lease from a contract of partnership.

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I might remark at once that in the consideration of this case I think myself justified in treating the lease to a large extent as a contract "*de bonne foi*" and to assume a liberty of appreciation for the purpose of conciliating conflicting interests and repressing unreasonable and vexatious claims. (See *Méplain Colonage Partiaire*, p. 129).

The circumstances which are set up in the action do not seem to me to indicate at all fully the source and origin of the difficulties between the parties.

The lease commenced in the fall of 1903 and was continued during 1904 which happened to be a very bad year for crops. The defendants, at the conclusion of that year, were dissatisfied and offered then to give up their lease, but the plaintiff refused to agree to that, so the defendants were obliged to continue on ; but on the 19th of December 1904, the plaintiff and the defendants made a notarial settlement of all matters relating to the contract of the parties up to that date, there being a general reserve however in the plaintiff's favor of damages, but what those damages referred to is not apparent in the case, either in the pleadings or otherwise.

During 1905, the defendants continued the lease, and the crops turned out much better, but in the latter part of that year difficulties arose between the parties principally from the fact that the farm apparently was leased with the intention of being run as a milk farm, that is the sale of milk would constitute at least three-fourths of the total income of the farm. It seems besides, and is proved without doubt, that in order that the cows which were kept on the farm should produce milk in any paying quantity, they had to be fed with materials which the farm did not produce, but which had to

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be bought and fed to them, such as *moulée*, bran and other articles of that kind. During the first year these articles were bought and were paid for in common by the plaintiff and the defendants without question, but in the summer of the second year, the plaintiff refused any longer to be responsible for the purchase of such material and refused to pay his one-half for that already purchased by the defendants. The cows, when properly fed as milch cows should be and are by all farmers doing that business, should have given an average of sixty gallons per day during the year, but when this food was withdrawn from them, as it has been since the institution of this action, the production of milk has fallen to fourteen or fifteen gallons per day, rendering the working of the farm wholly unprofitable.

Trouble also arose concerning the drains and fences, but it is doubtful whether it would have resulted in the present proceedings, had the difficulties above mentioned not existed. There is no proof whatever that any damage has been done to the productiveness of the farm by the condition of the drains or the fences, or indeed by any one of the defects which the plaintiff alleges the defendants were guilty of.

It is undoubtedly true that the lease does stipulate that the hay and straw fed to the animals should be cut, and it is undoubtedly true that the defendants did not cut the straw which they fed, while for the most part they did cut the hay, but they claim that it was not only useless but injurious to cut the straw.

Then it appears clear that the defendants have omitted to perform certain of the obligations which they undertook in their lease. Is the Court then bound to cancel the lease, as the plaintiff demands, in consequence of these omissions.

Of course the lease being in writing, the putting in default ought also to be in writing. The only written complaint which the plaintiff made to the defendants appears dated of the 15th of June 1905, and reads as follows : " You neglect " to whiten the buildings and the gates, you neglect to gather " up the small stones from the property ; you neglect to carry

" away the manure ; you neglect to repair the fences ; you neglect to clean the ditches ; you neglect to cut the branches and shrubs ; you neglect to repair the public road." It may be assumed that up to the date of this notification, no other faults had been committed by the defendants, and that other defects of a different character could only concern the period subsequent to the notification in question.

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As to the whitening of the buildings and gates, it is proved that this work was done by the defendants during 1905, but that a portion of the end wall extending up above the eaves of the roof was not done owing to the fact that the defendants did not have a sufficiently long ladder.

As for the gathering of the stones, no mention is made of that in the action, nor of the taking care of the manure.

As for the fences, the proof establishes that they were all of stone ; that in places they had completely fallen down and filled the drain along which they existed, and that they were in that condition when the defendants took possession of the farm, and that they were not in a worse order when the action was taken than they were when the defendants went into possession. The same remarks apply to the ditches.

It is seen that the protest in question does not mention the cutting of weeds, but only the branches and *broussailles*, and the proof is by no means satisfactory whether any of these things which had grown after the defendants went into possession of the farm, had not been cut by them. The defendants had cut the weeds which had grown during their possession, and claim that they were not obliged to cut shrubs or small trees which had grown before their possession.

The proof does not establish any negligence on the part of the defendants in connection with the public road.

With regard to the refusal to account, the proof shows that the only item in connection with that charge occurred after the date of the notification just above referred to.

On the 14th September 1905, accounts were settled between the parties for the sales which had been made by the defen-

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dants, but from that date up to the 5th of October, when the action was taken, the defendants had not accounted to the plaintiff or paid over any sums of money, although they had been several times to the market in Montreal and had sold for a certain sum of money. At that time there was an account due for *moulée* and other materials of that kind, to a considerable sum of money, of which the plaintiff refused to pay a share, which had been bought by the defendants for the feeding of the cows, and the defendants appear to have taken the ground that they had a right to retain the moneys which came into their hands in order to pay the account in question. However, there is no proof of any demand on the part of the plaintiff upon the defendants after the 14th of September, when settlement was made, up to the 5th of October, date of the action, to account for sale made between those dates, and pay the one-half of the proceeds, so that, at that time, there was no refusal on the part of defendants to accomplish that obligation. No place for the performance of that obligation was fixed in the lease. By the ordinary rule of law an obligation is to be performed at the domicile of the debtor and no demand was made at the defendants' domicile previous to action brought.

It may be said also, in reference to several matters which the defendants are alleged to have omitted that at the date of action brought, namely on the 5th of October, sufficient space of time still existed, during that year, for the performance of these obligations, and that would apply specially to such as fall ploughing, cutting of weeds or branches, repairing of fences and ditches. *Méplain*, p. 138 says: "Where the tenant, that is the *colon partiaire*, abandons or partially abandons the performance of his duty, the proprietor can obtain the resiliation of the lease, unless the negligence of which he complains is trifling and denotes rather an involuntary omission than an inability to perform his obligation or a refusal to do so. In this case, as always, justice should only admit serious complaints. The owner is not confined to the demand of resiliation. The obligation of the former is an

“ obligation to do, and the Civil Code opens, in case of non-performance, a way which he may follow if he prefers it.”

In the contract which forms the basis of the present action, a partnership no doubt exists. The defendants supply the work, they supply one-half of the animals and farming instruments, and the plaintiff supplies the farm, and they divide the products thereon between them. The administration of this lease would therefore devolve upon both, except in cases in which it appears clear that the parties have by the lease itself differently provided; for example, the stipulation that the defendants shall divide the proceeds of every sale means clearly that the defendants shall make the sale of garden stuff and vegetables; then clearly their position as farmers would indicate that they would judge as to the methods best suited for the administration of the farm. Doubtless the plaintiff would also have a right to be heard in such matters. The lease however specially provides that the plaintiff shall have the right to draw himself from the purchaser of the milk, the money which arises from that source, and that right has always been exercised.

It is clear also that the lease having in view the production of milk as its general object, the cows would necessarily have to be changed from time to time, and the question would arise upon whom would devolve the right to decide when non-productive cows should be sold and others more productive bought to replace them. This was done during the first year concurrently by the defendants and the plaintiff, and the partnership had the benefit of the proceeds of the sale of the cows and paid for the cows bought.

I do not find in the proof anything to indicate in any degree any bad faith on the part of the defendants or any omission to fulfil any of their obligations with a view of injuring the plaintiff.

As to the drains and fences, I would refer to *Mépluin* at p. 120, where he says: “ the *métayer* takes them in the state in which they may be. He is not bound to make them better and, as he is held to accept them without regard to

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1906 " their bad condition, when he goes away he is not like the
 Meunier dit " farmer reputed to have received them in good condition.
 Lagacé " His obligation with regard to that can only result from the
 v. " state of the place when the lease was made."
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Archibald, J. I am of opinion that the proof does not supply sufficient reasons for the resiliation of the lease in question. Doubtless the defendants are obliged to perform strictly all the obligations assumed by them in the lease, but I don't think that the slight omissions which have been proved against them are such as to justify resiliation. They might become so, if the defendants in their future occupation of the premises persistently refused and neglected to perform obligations to which their attention is directed, and perhaps even without the allegation that such neglect has been a cause of damage, but up to the present, no such damage is proved to have been caused, nor is even the work which the plaintiff has done been proved to be work which the defendants ought to have done.

The action of the plaintiff is accordingly dismissed with costs.

D. A. Lafortune, for the plaintiff.

Pélissier & Wilson, for the defendant.

SUPERIOR COURT.

MONTREAL, April 14th 1906.

Present :—ARCHIBALD, J.

LAURIN ET AL. V. MEUNIER DIT LAGACÉ.

*Contract of lease—Lease of farms—Obligations of lessor—
 Obligation to contribute to expenses—Agreement to
 renew unproductive stock—Specific performance.*

HELD :—A covenant in a lease of a farm that the lessor will contribute one half the expense of feeding the stock and that the latter, as it becomes unproductive, will be renewed by sale and purchase, will, in case of

breach by the lessor, give the lessee a right of action to be allowed to carry it out at the cost of the lessor.

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This is a case which is supplementary of the case of Meunier dit Lagacé *vs* Laurin *et al.* In this action, the tenants sue the proprietor alleging the lease which was spoken of in the previous case with the obligation to divide all the produce of the farm, the plaintiffs assuming the obligation as tenants to pay for the one-half of the value of the animals and of the farming implements, and thereupon allege that during the course of the lease up to the time of taking the action, the parties had always agreed upon the care and feeding of the cows at their common expense and that the defendant himself bought the necessary *moulée* and bran, etc, for feeding the cows, the cost of which was divided equally between the parties, and further that in such business it was necessary that the cows which would become non-productive as milch cows should be, from time to time, sold and others purchased in their place, so as to keep up the produce of milk upon the farm. The plaintiffs then allege that by a clause of the lease, the defendant had reserved to himself the right to collect from the persons to whom the milk would be sold, the price of such milk and to return the half thereof to the plaintiffs, which right the defendant always exercised up to the date of the action.

The plaintiffs further allege that although the defendant so controls the principal source of revenue on the farm he now refuses to contribute to the half of the necessary nourishment for the cows, and also refuses to contribute to the sale and replacement of the cows which become non-productive ; that moreover the defendant had taken active measures to prevent the plaintiffs from being able to purchase the things necessary for the cows ; that while the cows were being fed properly and in accordance with the custom for milch cows, they were producing from about \$200.00 to \$240.00 per month, whereas since by the action of the defendant they have been de-

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prived of the necessary food, their produce has fallen to about \$50.00 per month ; that the plaintiffs duly protested the defendant in the matter, and the plaintiffs pray that the defendant should be declared *déchu* of the reserve made in the lease of drawing and receiving himself the money arising from the sale of the milk, and that the plaintiffs should be authorized to receive it themselves ; that the plaintiffs should be authorized to buy the food necessary for the subsistence and proper care of the cows such as *moulée*, bran, etc., at the common expense of the plaintiffs and the defendant ; that they should be authorized to pay out of these moneys the sum of \$83.81 already due to one Cardinal for the defendant's share of the food and to dispose of cows becoming unproductive and purchase others in their place so as to always maintain a herd of thirty cows.

The defendant pleaded that he was in no wise obliged to buy any food for the cows ; that the farm was sufficient to raise all the food that was necessary for the cows if it were well farmed ; that true the defendant did during the lease contribute to the purchase of such food, but he did it without being obliged to do so ; that the plaintiffs had no right to sell any of the cows without the permission of the defendant or to replace them with others, and the defendant denies the essential allegations of the declaration.

The proof shows that at any rate the three quarters of the revenue of the farm were produced by the sale of milk of the thirty cows in question. There can, I think, be no doubt that at the time of the making of the lease the parties intended that the farm should be run as a milk farm principally.

The lease commenced in October 1903 and was to continue for a term of nine years. During the time from the commencement of the lease up to about the month of June 1905, the defendant had sometimes himself purchased *moulée*, bran, etc, for the use of the cows, and at other times had contributed to the payment of such articles purchased by the plaintiffs. He did so indeed until some time in the spring or summer of

1905, when it appears the defendant first pretended he was not liable for those expenses.

The proof also shows that all the arable portions of the farm which had been cultivated in previous years were cultivated also by the plaintiffs ; that the defendant lived close by and had daily opportunity of inspection of everything that was being done on the farm and may be assumed to know everything that was done with regard to the cultivation of the farm ; that he never made the least objection as to the manner in which the farm was being cultivated as to the quantity or nature of the crops which were being raised, not even up to the date of the action brought, except with regard to some points which do not concern these matters which were treated of in the other action.

The proof also shows that the purchase of food for the cows which was not, and it may be said, could not be grown solely upon the farm, was an absolute necessity for the cows as milk producers ; that further it was an absolute necessity that the cows should either be exchanged from time to time for other cows or else that they should be permitted to have calves that this latter alternative was not intended by either of the parties may be evident from the fact that during the first year and a half of the lease, the greater number of the cows originally put on the farm were exchanged for others with the consent of all parties. It may therefore be assumed that when the contract was passed between the parties it was intended that these cows should be exchanged as they became unproductive and that they should be fed in the usual manner in which they could be made profitable as milk producers.

It is moreover the universal custom throughout the country upon these milk farms that cows are to be fed in the manner above mentioned and to be exchanged.

Article 1700 speaking of *à cheptel* says: "In default of stipulations the contract is governed by the usage of the place where the herd of cattle is kept". Now, that usage in this instance is not doubtful and is as above mentioned. In this case

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as I observed in the other judgment, the contract is essentially one of good faith and a great liberality of appreciation must be left to the judge.

Méplain on *Colonage Partiaire*, at p. 166 and following discusses the administration of such a contract as the present one and particularly as to what portions of the administration would belong to the farmer and what portion of the administration would belong to the owner of the property. He decides that the interior administration, i. e., all that belongs to the cultivation of the farm and the care of the animals, etc. would be naturally the function of the farmer, whereas the relations of the partnership to third persons would be more naturally under the administration of the owner of the land.

In the present instance, the case is more favorable to the wide power of each one of the parties than in the case of an ordinary lease on shares such as Méplain was considering. There Méplain assumed that the owner would also be owner of all the cattle and agricultural instruments which were upon the farm and that the farmer would only have the work to perform and would have no share in the ownership of the animals, whereas in the present instance, the farmer did own one-half of the animals and one-half of the agricultural instruments, and so the relationship of actual partners as between them was more striking than under the supposition of Méplain.

It is a principle of partnership that each one of the parties has power of administration unless by the articles of partnership such power is taken away or diminished. In the present instance the only power which was reserved by the owner was that to collect the price of the milk from the persons to whom it would be sold. Nothing is said as to the limits of power for other operations between the parties.

Méplain, however, is not disposed to give to the farmer such wide powers as would naturally arise from his being considered as a partner, so that he would put into the hands of the owner the power to deal with third persons. That this power to some extent was intended to be given to the plaintiffs

in this case is evident from the fact that the contract stipulates that the plaintiffs shall, after every sale, account to the defendant for such sales, indicating of course that it was the intention that the plaintiffs should carry the products of the farm to market and should sell such products, receive the money and account therefor.

Méplain, at p. 180, No 193, discusses the question as to the purchase of food for the animals and says that it may happen that the food which the farm produces may be found insufficient; then he decided that speaking generally the farmer cannot oblige the owner to purchase more food than the farm produces, and says that the animals could be reduced in number; and then he says: nevertheless, if such sale cannot be made or if the food is found insufficient for the animals which are brought down to the necessary number, the case would fall under that of indispensable expenses, and the purchase of food should be made at the cost of the partnership. Here the lease stipulated the carrying on of the business with thirty milch cows, only thirty were on the farm and they were to be used for the purpose of producing milk. The purchase of additional food was indispensable for that purpose. The contract was so interpreted for eighteen months by the defendant, he purchasing such food himself and charging it to the partnership and also paying for such food, his one half of that which was bought by the plaintiffs, so that the case falls precisely within the remarks of Méplain. At an earlier page he decided with regard to the purchase of manure, that the owner was obliged to purchase the necessary manure for the purpose of fertilizing the land.

But has the Court now authority to give a judgment pronouncing upon the mere interpretation of the lease and declaratory of the rights of the parties thereunder? At page 157, Guillouard on Lease, 2nd Vol. says:—"Contrary to what happens in an ordinary lease where the lessor has no right to meddle with the direction of the cultivation, in a lease à *Colmage Partiaire*, the lessor may give orders to the farmer for the manner of cultivation. The reason is that the

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“ lessor has a direct interest in good cultivation, since it is
 “ from that that depends the quantity of the fruits which
 “ he will have to receive, but on the other side, the farmer
 “ has an interest also in the good cultivation. He has even
 “ a greater interest than the proprietor for his capital is en-
 “ gaged in it, and if there are losses it is he who has to sup-
 “ port them. What then would happen if the proprietor and
 “ the farmer do not agree upon the mode or conditions of cul-
 “ tivation ? In such a case, it is for the Court to pronounce;
 “ taking into account the local usage of the place and by using
 “ wise conciliation.”

At page 426, No 927 the same author says:

“The sale of the animals given *en cheptel* may be some-
 “ times an act of wise administration, the farmer demands it,
 “ the lessor refuses or *vice versa*. Can the party who demands
 “ the sale ask the Court to compel the other party ?

“No says a first opinion, the refusal of the proprietor or of
 “ the farmer is an absolute refusal, for no one can be forced
 “ to sell his property, and they are proprietors one of the
 “ herd and both of the increase.

(Here it is observed again that in the lease discussed, the
 owner is proprietor both of the farm and of the animals upon
 it).

“Such is not our opinion. In fact experience demonstrates
 “ that when two persons do not agree, it is enough that one
 “ proposes a thing whether reasonable or not, the other will
 “ object to it. It is then from this point of view very desira-
 “ ble to be able to overcome the capricious refusal of one of
 “ the parties. Now, such was the rule in our old laws and
 “ Pothier confirms it in the following words: If the lessor re-
 “ ses to consent to the sale, the farmer may summon him be-
 “ fore the Court to have it ordered by the Judge.

“As this is only question of a measure of administration,
 “ which the Courts would only order when its utility was de-
 “ monstrated, this tradition is sufficient to authorize the asser-
 “ tion of its legality. There is no question in fact of aiming a
 “ blow at a right of property, but only of regulating in the

“ most equitable manner, the consequences of a common enjoyment.”

Following these authorities, I find myself in a position to declare, that, it was a condition of the lease established by universal usage that the milch cows in question in this case should be fed with food which required to be purchased, which was absolutely essential to enable them to produce milk in paying quantities, and that such was the intention of the parties, and further that it was absolutely necessary that, from time to time, the cows should be, as they became unproductive, exchanged for other cows which were productive and that both parties were obliged to contribute to the expenses resulting from that change.

It is clear therefore that the plaintiffs are right in demanding that the share of the defendant in the partnership should be used for the payment of the sum of \$83.21, as his proportionate contribution to the cost of goods already bought for said cows, and further that the defendant should be ordered in conjunction with the plaintiffs to purchase from time to time the food such as *moulée* and bran which are necessary for the support of said cows, and further that he should also be ordered in conjunction with the plaintiffs to keep the herd of cows up to the number of thirty milk-bearing profitable cows by exchanging those which should become unprofitable.

With regard to the demand of the plaintiffs that the right to collect the moneys from the sale of the milk should be taken away from the defendant, that would be a breach of the contract which the parties have entered into with each other, and I do feel myself authorized to make such an order.

The plaintiffs' action will be maintained in the sense above set forth with costs.

The directory part (*dispositif*) of the formal judgment is in the following words :

“ The Court orders that the defendant shall comply with the obligation above set forth, shall pay the said sum of \$83.21 his share of food purchased previous to the action in this case, and in default of the defendant so doing, the Court au-

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 “thorizes the plaintiffs after having notified the defendant, to purchase such food as may be necessary for said cows according to the custom of the place and to sell those cows which become unprofitable and buy others to replace them, and to recover from the defendant out of the moneys which may be at any time in the plaintiffs’ hands or by action at law, the expenses of such purchases of food and of cows, and the Court condemns the defendant to pay the plaintiffs’ costs.”

Pélissier & Wilson, for the plaintiff.

D. A. Lafortune, for the defendant.

COURT OF REVIEW.

MONTREAL, 31st May 1906.

Present :—SIR MELBOURNE M. TAIT, A. C. J., PARADIS
 AND ROBIDOUX, JJ.

CAMPBELL ET AL. V. BEYER ET AL.

Contract of pledge—Construction—Covenant that in default of payment, pledgee may “dispose” of the thing—Pledge of shares in joint stock company—Sale by auction of shares pledged—Notice of sale to shareholders only.

HELD :—The pledgee who is authorized by the contract to dispose of the thing pledged in default of payment of the debt and to apply the proceeds thereto, can only do so by a public sale duly advertized. Where a number of shares in a joint stock company were pledged with the above covenant, a sale of them by auction, at which the pledgee bought them for less than their value, of which notice was given by private circular to the other shareholders of the Company only, was not such a “disposing” of them as was intended by the contract.

The judgment inscribed for Review was rendered in the Superior Court, ARCHIBALD, J., on the 30th of January 1905, as follows :

ARCHIBALD, J. :—

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The plaintiff sues the defendants, B. W. Beyer and F. R. Lanigan, for the sum of \$1,256.49 as the balance due on a promissory note of \$2,251.76 and costs of protest.

Beyer is the maker and Lanigan the endorser of the note. The defendants plead separately. Beyer sets up that a number of shares of the capital stock of the Campbell Manufacturing Company was given by him as collateral security for the payment of the note, and that the stock was worth more than the total amount of the note, and if the plaintiffs converted the stock to their own use and treated the same as their own property, it would be taken in discharge of the whole of the defendant Beyer's indebtedness, and that it was by negligence that the defendant Beyer's notes were not delivered back to him.

Lanigan pleads that his endorsement was solely for the accommodation of the plaintiffs ; that the note was the last of a series of four notes aggregating \$7,200.00, signed by the defendant, Beyer, and endorsed by Lanigan, being for the purchase of a certain business; that the payment of the notes was secured by the transfer of stock, which the plaintiffs took as their property, in full discharge of the debt of Beyer to them ; that the plaintiffs called a pretended auction sale of the said shares, so given as collateral security, and illegally purchased them at fifty per cent of their value; that before the said sale the defendant, Beyer, imputed the proceeds thereof upon that one of the notes for which Lanigan was liable, it being the only one of the four which had been protested, and that the proceeds were more than sufficient to cover the note.

The proof establishes that before the incorporating of the Campbell Manufacturing Company, the defendants purchased

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from A. B. Campbell & Co, their business, for \$14,400, for which they gave their joint and several notes. Subsequently, the incorporation took place. Then the relations of the parties were changed and the plaintiffs agreed to accept from the defendants their several notes, each for one-half of \$14,400., secured by the transfer on the part of each of seventy-three shares of the capital stock of the incorporated company. Beyer did not endorse the series of notes for Lanigan's half of the purchase price, but Lanigan did endorse for Beyer's half of the purchase price, and his endorsement appears on the said notes as an endorsement *par aval*. The company has been successful, although, up to the date of this action, it has paid no dividend. The first three notes fell due, but the plaintiffs did not cause the endorsement of Lanigan to be protested. Before the notes made by Lanigan fell due, the plaintiffs arranged to accept seventy-three shares of Lanigan's stock, as payment in full of his notes, and return to him his notes. At that time no mention was made of the notes of Beyer, but the plaintiffs, during the whole period and up to the sale of the shares, were registered as shareholders of the Campbell Company, holding the whole one hundred and forty-six shares transferred to them as collateral. The plaintiffs sold by auction the seventy-three shares deposited by Beyer, and the only bid made was that of the plaintiff A. S. Campbell. At an earlier date, the stock had been pledged by Campbell to secure a loan, but was afterwards withdrawn from pledge on payment of his loan. The defendant Beyer claims that he should have been tendered the stock held as collateral. By article 1971 of the Civil Code, a creditor holding a pledge cannot dispose of it in default of payment of the debt, but may have it seized and sold by process of law. It also provides that a creditor may stipulate that in default of payment, he will have the right to keep the pledge. In the present case it was stipulated that the creditor would have the right to dispose of the pledge, without specifying the manner in which such disposition should be made. By the

law as it existed before the Code any stipulation authorizing the creditor to dispose of his pledge by means other than those prescribed by law, was null and void, as being against public order therefore article 1971 must be strictly construed and cannot be extended to cover other stipulations, which were, at common law, null and void. The plaintiffs, therefore, are not entitled to obtain payment of the note without tendering back the collateral security and they do not make this tender. The plaintiffs' action against Beyer as it stands is unjustified and must be dismissed without costs, saving the plaintiffs' recourse. As to the defendant, Lanigan, as endorser of the note, he is entitled to use the same defences as those which apply to Beyer, and the plaintiffs' action against him is also dismissed. The plaintiffs must either offer to return the collateral deposit or dispose of it according to law.

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Authorities referred to—28 Laurent, No 509 *et seq.* 4 Fuzier-Herman, article 2078.

SIR M. M. TAIT, A. C. J. :—

This is an inscription in Review from a judgment rendered by the Superior Court, at Montreal, dismissing the plaintiffs' action which was to recover a balance of \$1,269.00 alleged to be due on a promissory note for \$2,251.76 signed by the defendant Beyer and endorsed by the defendant Lanigan.

This note was given under the following circumstances : sometime before the incorporation of the A. S. Campbell Manufacturing Co., the defendants purchased from the commercial firm of A. S. Campbell & Co. the business which had been previously carried on by the latter for the sum of \$14,400.00, for which they gave their joint and several notes. Subsequently the business was incorporated under the above name, and the relations between the defendants and the plaintiffs being changed, the plaintiffs agreed to accept from the defendants their several notes, each for one-half of the sum above mentioned, secured by the transfer by each to the

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plaintiffs of seventy-three shares of the capital stock of the Company so incorporated.

The defendant Beyer did not endorse the series of notes given by Lanigan for his half of the purchase price, but the latter did endorse those given by Beyer for his half, such endorsement appearing on the notes as arrendorsation "par aval."

None of the notes were paid at maturity, but the only Beyer note endorsed by Lanigan which was protested for non-payment, was the last one now sued upon.

Before the notes made by Lanigan had fallen due, the plaintiffs had arranged to accept his seventy-three shares of stock as payment in full of his notes and returned his notes to him. No mention was made one way or the other as to the notes of Beyer. On the 22nd of July, the plaintiffs sent the following notice to the shareholders in the Company, including the defendants: "To whom it may concern."

"There will be sold by auction at the office of Walter M. Kearns 1828, Notre-Dame street, on Thursday August 4th 1904, at three o'clock P. M., seventy-three shares of the capital stock of the Campbell Manufacturing Company, Ltd, held as collateral for a debt of W. D. Beyer. Conditions of sale, cash on delivery of certificates." The sale took place in accordance with this notice on the 4th of August. Only one bid was made at this sale, which was by the plaintiffs, of fifty cents on the dollar, and the stock was knocked down to them at that price.

This action is to recover the balance due on the note.

The defendants appeared and pleaded separately. Beyer's defence was: (1) that the note was paid and the debt extinguished by the plaintiffs appropriating the stock to their own use, which was worth more than the total amount of the notes given by him; (2) that, as bailees of the stock, the plaintiffs were obliged to dispose of it according to law with diligence, after maturity of the first note, when they would have realized more than sufficient than to extinguish the whole of the indebtedness; (3) that the plaintiffs did not dispose of

the stock in a regular and legal manner, and the defendants are not responsible for the loss ; (4) that the plaintiffs should have returned the defendants' notes when they appropriated the stock, in the same way as they returned Lanigan's to him.

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The defendant Lanigan plead in addition to these grounds: (1) that the note was endorsed by him as accommodation to the plaintiffs, to assist them in discounting it, and (2) that from the position of his endorsement thereon the plaintiffs have no recourse on it against him, and (3) that the proceeds of the sale should have been imputed to the payment of the note sued upon as requested by the letter of the attorney of the defendant Beyer of the 3rd August 1904.

A clause in the agreement of the 23rd of December 1901 under which the shares were transferred as collateral security is as follows : "In default of the payment of any of the above notes and not otherwise, I hereby authorize A. S. Campbell & Co. to dispose of such stock, and to apply the proceeds to the payment of such notes, without prejudice to their claim for deficiency in amount of net proceeds from the sale of such stock."

The Court of first instance after quoting art. 1971 C. C. held that by the law as it existed before the Code, a stipulation authorizing a creditor to dispose of his pledge by any means other than those provided by law was null and void, as being against public order ; that the effect of the clause of art. 1971 which authorizes the creditor to stipulate that in default of payment he shall have the right to keep the thing, cannot be extended so as to cover other stipulations which were at common law null and void ; that plaintiffs were not entitled to obtain from the defendants the payment of the balance of the note without tendering back the collateral security, which tender they do not make and that therefore the plaintiffs' action against Beyer was unfounded, and that the defendant Lanigan as endorser being entitled to use the same defence as that pleaded by Beyer, the action cannot be sustained

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against him either. The Court therefore dismissed the action against both defendants with costs.

I am of opinion that the *dispositif* of this judgment should be confirmed upon the ground solely that the plaintiff could not become purchaser of this stock himself (article 1484 and article 1706 C. C.), and that, even if he could have done so, it could only have been at a public sale, and that the sale lacked one of the essential elements of a public sale, inasmuch as it was not publicly advertised.

I feel, however, unable to concur with the interpretation given to the clause in question of article 1971 which reads as follows: "The creditor may stipulate that in default of payment he shall be entitled to retain the thing" or as the French article puts it: "Aura droit de garder le gage," and I desire to express my view upon this and upon some other points raised by the defendant.

In order to understand properly the view taken by the codifying commissioners when they drew this amendment, I would refer to the last clause of article 2078 of the C. N. which enacts: "Toute clause qui autoriserait le créancier à s'approprier le gage ou à en disposer sans les formalités ci-dessus, est nulle". The commissioners in art. 5 of their project (Vol. 3, p.155) inserted a similar provision but suggested an amendment which was adopted by the Legislature in the terms already above cited forming part of our article 1971.

In their report, p. 50, they say: "The law as declared in art. 5 coincides with the Code Napoléon. In both the ancient and modern systems of law, the rule contained in the last clause of the article corresponds with that of the Roman law, by which any agreement authorizing the creditor to appropriate or dispose of the thing, otherwise than as specified in the article, was null. This prohibition to appropriate or dispose of the thing was intended to prevent usury in contracts of this nature, and, as the reason of the law has ceased, the commissioners are of opinion that the prohibition should be removed as it no longer harmonizes with our

"law of interest, and have submitted an amendment accordingly." Now, surely in speaking of this *prohibition*, the commissioners mean both the prohibition to appropriate or to dispose of the thing, and they express the opinion that this prohibition should be removed, and they evidently thought they were removing it by their amendment.

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The stipulation giving the creditor the right to retain (*de garder*) does not merely mean the right to retain the thing until the debt is paid (*droit de rétention*) for he has that right by law (art. 1975), but it means to keep it as proprietor ; to appropriate the thing and become proprietor without any recourse to law, upon the mere default of the debtor to pay. Becoming such proprietor, he would have the right to sell it at any price he chose. Surely if he could stipulate in his favor such a right, he could also stipulate that he should have a right to dispose of the thing in default of payment, for it seems to me this is not a more extended right than to appropriate as proprietor.

In the case of *Stuart & The St Ann's Building Society* (1), which was a case under cap. 10 of the consolidated statutes of L. C. relating to building societies, this question of the rights of the pledgee to keep or sell the property given as security came under discussion in the then Court of Queen's Bench. Section twelve of that act gave the society the right to sell in case of non-payment and to apply the proceeds to the payment of the debt, subject to accounting for any surplus, but the stipulation between the borrower Cox and the society was that it should have the right to retain (*garder*) the property and this is what the society did, although the statute as above mentioned only authorized it to sell upon the conditions above cited.

The learned Chief Justice, after citing art. 1691 and section twelve, said : " Cette section n'est pas limitative, en ce sens qu'elle n'enlève pas à la société le droit de stipuler qu'à

(1) 1 Q. B. 320.

1906	" défaut de paiement elle pourra garder le gage. En résumé,
Campbell	" d'après la convention contenue dans les deux actes, la soci-
et al.	" été a dit à son emprunteur : vous me transporterez votre
v.	" propriété et vous la reprendrez en me remboursant le prêt,
Beyer et al.	" de la manière, et aux époques convenues, et, si vous n'effect-
Tait, A. C. J.	" tuez pas le remboursement ainsi que stipulé, je garderai, et
	" la propriété et ce que vous aurez payé. Il n'y a là aucune
	" obligation de rendre compte. C'est là le pacte commissaire
	" défendu par l'ancien droit, mais autorisé par notre code."

Here then the right to sell given by the statute, was held to extend to the right to appropriate the property pledged. The Code is regarded as a statute *Bank of England vs The Banque Bagliano* (1). It seems to me that with greater force we can say that the right to appropriate ought to extend to the right to sell, for the rule that the greater includes the lesser is applicable to this case, rather than the maxim invoked by the defendants, that the express mention of one thing implies the exclusion of another. The right given by art. 1971 to appropriate seems to me to be larger than the right to sell and to include it.

In the case of *Murray vs The Montreal and Sorel Railway* (2) Mr Justice Jetté distinctly recognized the validity of a stipulation giving the pledgee a right to sell. His holding in that case was: "Que la convention, par laquelle le créancier gagiste est autorisé à disposer du gage, pour un prix déterminé, n'empêche pas ce dernier de le faire vendre, s'il ne trouve pas à en disposer, de gré à gré pour le prix déterminé ;" and in a case of *Charrier vs Boutin* (3) Mr Justice Andrews also recognized the validity of a stipulation that in default of payment within eight days, the pledgee would have the right to sell the thing pledged, the defendant pledgor expressly denied basing himself on art. 1971, the action brought to recover the price of the thing pledge was dismissed.

(1) 60 L. J. Q. B. 145.

(2) 20 R. L. 435.

(3) 13 S. C. 384.

For these reasons, I am of opinion that in confirming this judgment we should not adopt the reasons of the first Court as to the effect of this stipulation allowing the plaintiff to dispose of the stock.

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The defendant Lanigan, in addition to raising this question of the legality of the sale, has raised other points which it is not necessary to discuss, for as endorser of the note he is entitled to the benefit of the same defence as Beyer, and therefore the action must also be dismissed against him for the same reasons as we are dismissing it as against Beyer.

Tait, A. C. J.

The judgment is therefore confirmed with costs.

Busteed & Lane, for the plaintiffs.

Barnard & Dessaulles, for the defendant Beyer.

Blair & Laverty, for the defendant Lanigan.

COUR SUPÉRIEURE.

MONTREAL, 15 octobre, 1906.

Présent:—TASCHEREAU, J.

GÉVRY v. WEIR ET AL.

Droit criminel—*Condamnation sommaire à emprisonnement avec travaux forcés par application d'une loi qui ne les inflige pas*—*Certiorari*.

Jugé :—Une condamnation par le recorder de Montréal à neuf mois de prison avec travaux forcés, par application d'une loi qui n'édicte qu'une pénalité de six mois d'emprisonnement au moins et d'un an au plus, est nulle et sujette à cassation par voie de *certiorari* devant la Cour Supérieure.

TASCHEREAU, J. :—

Le requérant, pour *certiorari*, a été condamné par le recorder R. S. Weir, à neuf mois de prison commune aux travaux forcés, le 28 mars 1906, pour avoir été trouvé flânant ivre

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dans un chemin de la Cité de Montréal, et de plus, pour être un ivrogne d'habitude et incorrigible.

Le requérant allègue que le recorder, en le condamnant ainsi, appliquait la 62 Vict. ch. 58, sec. 493, Québec, où il est dit: "Que dans les cas d'ivrognerie habituelle et incorrigible le recorder pourra, à sa discrétion, condamner les délinquants à un emprisonnement de six mois au moins et d'un an au plus".

Gévry prétend que la loi provinciale en vertu de laquelle il a été condamné n'inflige pas les travaux forcés.

Le second point soulevé, est que la législature provinciale, en édictant une telle loi, a outrepassé ses pouvoirs; que cette loi est *ultra vires*. Le troisième point soulevé, est que le requérant, étant accusé d'avoir été trouvé flânant ivre, de jour, ne pouvait pas être condamné comme ivrogne d'habitude et incorrigible.

La conviction prononcée par l'intimé comme recorder de la cité et du district de Montréal le 28 mars 1906, condamnant le requérant à un emprisonnement de neuf mois dans la prison commune du district de Montréal, avec travaux forcés, pour l'offense d'avoir été trouvé flânant ivre, en la dite cité, le 27 novembre 1906, et d'être une personne désœuvrée et déréglée dans le sens de la loi, avec l'aggravation d'être un ivrogne d'habitude et incorrigible,—est une conviction illégale et nulle, en autant que l'intimé, à raison de telle offense, ne pouvait condamner le délinquant qu'à un emprisonnement de six mois au moins et d'un an au plus, et que la condamnation aux travaux forcés n'était pas autorisée par la loi et entache de nullité la sentence prononcée.

Pour cette raison seulement j'accorde la motion du requérant, je maintiens le *certiorari* et casse et annule la conviction, avec dépens, contre la mise-en-cause, distraits à Mtre L. Houle, avocat du requérant.

L. Houle, pour le requérant.

O. Lavallée, pour la cité.

C. A. Wilson, pour le proc-général.

COUR DE RÉVISION.

QUÉBEC, 31 mai, 1906.

Présents:—ROUTHIER, J. en ch., CIMON & LANGELIER, JJ.

BLOUIN ET AL. V. LE SÉMINAIRE DE RIMOUSKI.

Testaments—Forme authentique—Formalités—Énonciations—Nullité—Testament nul suivant une forme et valide suivant une autre—Vérification de testaments olographes et suivant la forme anglaise—Vérification au cours de l'instance—Interprétation des legs—Expression "biens ecclésiastiques."

JURÉ:—1o. Est nul comme testament suivant la forme authentique, celui fait devant un notaire et deux témoins, dans lequel il n'est pas fait mention qu'il a été lu au testateur par le notaire en présence des témoins.

2o. Un testament nul suivant la forme authentique, à cause de l'omission d'une formalité, peut être valide suivant une autre forme, s'il contient tout ce qu'exige cette dernière. Par suite, un testament signé, à la fin, de son nom par le testateur, devant un notaire et deux témoins idoines présents en même temps et qui l'attestent et le signent de suite en présence et à la réquisition du testateur, quoique nul suivant la forme authentique parce qu'il n'énonce pas l'accomplissement de cette formalité, est valide d'après le mode dérivé de la loi d'Angleterre.

3o. La vérification de deux testaments qui contiennent les mêmes dispositions, dont l'un nul suivant la forme authentique est valide suivant la forme anglaise et l'autre est olographe peut se faire au cours de l'instance où ils sont invoqués.

4o. La disposition finale dans un testament fait par un prêtre de la religion catholique, à la suite de legs particuliers, par laquelle il lègue "*tout le reste de mes biens ecclésiastiques*", est un legs universel de tous les biens restant au testateur.

CIMON, J. :—

Le Révérend F. A. Blouin, prêtre, curé de St Joseph de Carleton, aurait, le 28 juin 1895, fait un testament olographe.

Le 3 juillet 1895, il aurait fait un autre testament devant Mre Trépanier, notaire, et les témoins Frederick Bajold et Zoël Bernard, par lequel, après avoir recommandé son âme à

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Dieu, pourvu à ses funérailles et à des messes pour le repos de son âme, au paiement de ses dettes et aux réparations de ses torts, "si torts j'ai causés," légué \$100 aux pauvres de Carleton, \$100 à l'église de Carleton, \$50 à la mission de St Louis, \$150. à sa servante, une rente viagère annuelle de \$33 à sa sœur Julie, et le capital de cette rente, au décès de celle-ci, à deux enfants de sa sœur, sa bibliothèque et \$100 à son neveu le Révérend Lavoie, \$650 à son frère Hubert, \$250 à sa sœur Adeline, \$100 à sa nièce Eugénie Lavoie, son harmonium et \$50 à sa nièce Marie Turcotte, \$300 au couvent de Carleton pour continuer l'éducation de ses deux nièces, puis au séminaire de Rimouski à titre de fondateur de l'œuvre pour pension et éducation d'élèves pauvres, \$1,200 et aux œuvres de la propagation de la foi \$200,—il termine comme suit :

" 160 Je donne et lègue à la même susdite corporation du " séminaire de Rimouski *tout le reste de mes biens ecclésiastiques.*"

Et il nomme, ensuite, les Révds MM. Gagné et Lavoie ses exécuteurs testamentaires.

Ce testament ne constate pas qu'il a été lu au testateur "par le notaire *en présence des témoins.*" Pourtant, l'art. 843 C. C. exige que le testament le constate.

Et les demandeurs, dans leur action, après avoir allégué le décès du Révd F. A. Blouin, et avoir dit qu'ils sont ses seuls héritiers légaux, c'est-à-dire les héritiers de sang, et que le séminaire de Rimouski, en vertu de ce prétendu testament devant Mtre Trépanier, comme légataire universel y institué, s'est emparé des biens laissés par le dit testateur, ajoute que ce testament est nul : 1o parce qu'il ne contient pas l'énoncé que lecture du testament a été faite par le notaire ou testateur en présence des témoins y nommés ; 2o parce que les témoins n'étaient pas idoines et capables, étant octogénaires, sourds, et n'ayant pas la plénitude de leurs facultés mentales. Et les demandeurs concluent : 1o que ce testament soit déclaré nul ; 2o que le jugement déclare les demandeurs héritiers du dit Révd F. A. Blouin ; 3o que le séminaire de Rimouski soit condamné

à leur remettre et restituer la succession du dit Révd F. A. Blouin, dont il s'est également emparé.

Le séminaire de Rimouski a plaidé, invoquant sa qualité de légataire universel, en vertu du testament notarié mentionné en l'action ; et il dit que ce testament est valide comme testament authentique, ajoutant que s'il n'était pas valide comme testament authentique, alors il était valide comme testament d'après le mode dérivé de la loi d'Angleterre ; le séminaire de Rimouski, ainsi que les demandeurs, ont admis la validité de ce testament en acceptant les legs particuliers qu'il contenait en leur faveur ; que, d'ailleurs, antérieurement à la date du testament, le même testateur aurait fait un testament olographe contenant les mêmes dispositions et au paragraphe 20 de la défense, le séminaire de Rimouski dit : 20 "La défense fera en " cette cause la preuve et la vérification complète du dit testament olographe." Et la défense conclut : "Pourquoi le défendeur se réservant le droit de faire vérifier les testaments en question (c'est-à-dire le testament suivant la forme dérivée de la loi d'Angleterre, et le testament olographe), si nécessité il y a, " conclut au renvoi de l'action."

Les demandeurs répondent à ce plaidoyer en niant les allégations et disant que l'incompétence des témoins rend impossible la validité du testament, soit comme authentique, soit sous la forme dérivée de la loi d'Angleterre ; que le testament n'a pas été traité autrement que comme testament authentique par le défendeur qui ne l'a pas fait vérifier.

Le 20 septembre 1905, la Cour Supérieure, présidée par l'honorable juge Carroll, a jugé comme suit :

" Considérant que le dit testament est nul sous la forme " authentique, mais peut valoir sous la forme dérivée de la " loi d'Angleterre, et qu'il est utile d'en faire la vérification " d'après les procédures indiquées à notre code, met cette cause " hors de délibéré, les intéressés devant procéder à cette vérification à leur diligence, dépens réservés. "

A la suite de cette ordonnance, dans la présente cause, sur requête au juge de la Cour Supérieure, de la part du défendeur, pour vérification du testament devant le notaire Trépanier du

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 v. preuve contradictoire, a, le 9 mars 1906, vérifié le dit testament;
 Séminaire de Rimouski. et le même jour, 9 mars 1906, la cour adjugeait sur le mérite
 Cimon, J. de l'action, comme suit :

“ Considérant que le testament olographe a été dûment
 “ prouvé dans la cause; considérant que le plaidoyer du défen-
 “ deur est bien fondé, et que les demandeurs ont contesté ce
 “ plaidoyer qui est maintenu, renvoie l'action avec dépens.”

Les demandeurs inscrivent en révision tant du jugement
 vérifiant le testament que de celui déboutant l'action.

I. Il n'y a pas de doute que le testament du 3 juillet 1895,
 devant M^{re} Trépanier, notaire, est nul comme testament au-
 thentique, parce que le testament ne mentionne pas que *le no-*
taire l'a lu au testateur en présence des témoins. Cela était
 une formalité exigée par l'art. 843 C. C. et l'art. 855 dit que
 cette formalité devait être observée même à peine de nullité.

II. Mais cet art. 855 dit qu'un testament fait apparemment
 sous une forme et nul comme tel à cause de l'inobservation
 de quelque formalité, peut être valide comme fait sous une
 autre forme, s'il contient tout ce qu'exige cette dernière.

Aussi, a-t-on procédé dans cette cause même à la vérifi-
 cation du testament du 3 juillet 1895, nul comme authentique
 pour valoir comme testament selon la forme dérivée de la
 loi d'Angleterre.

L'art. 851 donne les formalités du testament selon la forme
 dérivée de la loi d'Angleterre. (a) “Il doit être rédigé par
 “ écrit et signé, à la fin, de son nom ou de sa marque par le
 “ testateur, ou par une autre personne pour lui en sa présence
 “ et d'après sa direction expresse.” Or, le testament en question
 est rédigé par écrit; il a été signé, à la fin, par le testateur lui-
 même; cela est hors de tout doute. (b) Il faut, de plus, que la
 signature du testateur soit “ alors ou ensuite reconnue par le
 “ testateur comme apposée à son testament alors produit de-
 “ vant au moins deux témoins idoines présents en même temps
 “ et qui attestent et signent de suite ce testament en présence

“ et à la réquisition du testateur.” Deux témoins ont signé ce testament : c'étaient deux vieillards. Les demandeurs disent que ces témoins n'avaient pas leurs facultés mentales ; la preuve nous satisfait qu'ils avaient assez leur intelligence pour être des témoins idoines.

Les demandeurs disent aussi que ces témoins étaient sourds.

Il est vrai qu'il fallait leur parler fort. Mais la preuve nous a convaincu que le testament a été lu d'une voix forte ; que les deux témoins y ont porté une grande attention et qu'ils ont parfaitement entendu et compris la lecture du testament et ce qui s'est dit alors. L'un de ces deux témoins a même témoigné en la présente cause, et quoique ce n'est que dix ans après la date du testament, il a rendu un témoignage raisonnable, et les avocats qui l'ont questionné, ont pu se faire entendre et comprendre de lui. Il est prouvé que les témoins ont signé en présence du testateur ; et quoique la preuve soit à ce sujet moins claire, je crois qu'elle montre aussi que c'est à la réquisition du testateur et pour reconnaître sa signature à ce testament, que les témoins ont signé. D'abord, ils ont signé de suite après le testateur et en sa présence : c'est le testateur qui les a fait venir exprès pour être témoins à ce testament ; et le testateur a été satisfait. Le notaire Trépanier, qui est aujourd'hui âgé de 75 ans, complètement aveugle, et très malade, qui peut bien avoir oublié comment les choses se sont passées il y a dix ans, jure, cependant, que *le testament fait foi de tout*, c'est-à-dire que les choses ont eu lieu tel que le mentionne le testament, et il dit qu'il croit que c'est devant les témoins que le testateur a signé, et, ajoute-t-il, “ tout ce que je sais, c'est “ qu'ils ont signé en même temps que lui.” Et l'ordre des signatures au testament montre que c'est le testateur qui a signé le premier, corroborant ainsi le notaire.

Il est vrai que Zoël Renaud, l'un des témoins (l'autre est depuis décédé) aujourd'hui octogénaire, dit que les témoins ont signé avant le testateur ; mais c'est dix ans après la date du testament qu'il parle ainsi ; et, évidemment, il fait erreur. Nous croyons donc que les exigences de l'art. 851 du C. C. pour un testament suivant la forme dérivée de la loi d'An-

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gleterre ont été observées. Et le plaidoyer invoque spécialement ce testament comme valide sous cette forme, et il est vérifié.

Les demandeurs ont fait cette objection que le notaire Trépanier est aveugle, et que, en produisant ce testament, c'est-à-dire la minute de l'acte qu'il a fait, il n'a pu l'identifier. Mais cette objection disparaît, et la preuve ne laisse pas de doute que c'est le vrai document.

III. Maintenant, n'étant pas valide comme testament authentique, s'il ne valait pas, non plus, comme testament suivant la forme dérivée de la loi d'Angleterre, le défendeur invoque, en outre, dans son plaidoyer un testament olographe, en disant : "le défendeur fera en cette cause la preuve et la vérification complète du dit testament olographe." Et, de fait, le défendeur l'a prouvé, et ce testament olographe le fait légataire universel. Ce testament olographe aurait d'abord été fait en 1891, mais le 28 juin 1895, le testateur y a fait certaines corrections et il a changé la date en la mettant du 28 juin 1895. Il a été prouvé que ce testament est écrit en entier et signé de la main du testateur ; les corrections et les changements sont de sa main.

L'art. 850 C. C. dit qu'un tel testament n'est assujéti à aucune preuve particulière. Et l'art. 854 C. C. dit : "qu'il n'est pas nécessaire que le testament soit signé à chaque page." Or, la signature du testateur est à la fin, sur la dernière page, et cette signature couvre tout ce qui la précède sur la page et les pages précédentes. Il n'est pas nécessaire d'une vérification plus spéciale, car il est produit dans la présente cause, et prouvé, et le plaidoyer l'invoquait en disant qu'il sera prouvé et vérifié dans la cause. Et nous le trouvons prouvé. Cela suffit.

Comme le testament sous forme authentique est nul, et s'il ne valait pas comme testament suivant la forme dérivée de la loi d'Angleterre, il ne pourrait révoquer le testament olographe antérieur, car l'art. 895 C. C. dit que "la révocation contenue dans un testament nul par défaut de preuve, est nulle."

IV. Une dernière question. Le testament olographe, com-

me l'autre, dit: "Je donne et lègue à la susdite corporation du
 " Séminaire de Rimouski tout le reste de mes biens ecclésiastiques:—

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D'après le témoignage de M. l'abbé Gagné, on appelle *biens ecclésiastiques* ceux gagnés par un curé dans l'exercice de son ministère. Et M. l'abbé Gagné ajoute: "D'après le concile de
 "Trente, les *biens ecclésiastiques* sont les biens qui proviennent
 "de la dime. Le curé a droit de prendre sa subsistance, et la ba-
 " lance doit être donnée aux œuvres pieuses. Quant aux *biens*
 "*parcimoniaux*, c'est-à-dire les économies, il peut en faire
 " l'usage qu'il voudra."

Malgré que M. Gagné dise que "ce n'était pas tous des biens
 " ecclésiastiques que M. Blouin avait. Il avait des biens parci-
 " moniaux;" cependant, il n'y a pas de preuve de biens parcimo-
 niaux. On a bien parlé d'un legs de \$2,000.00 qu'il aurait
 eu d'un de ses frères, mais ceci n'est pas prouvé, ce n'est qu'un
 ouï-dire. Et les testaments, surtout celuiolographe, montrent que
 le testateur dispose de tous ses biens; et on voit que le testateur
 considère qu'il n'a pas d'autres biens (surtout après les legs par-
 ticuliers faits) que ceux qu'il appelle *ecclésiastiques* ou, plutôt, il
 déclare que tous ses autres biens sont ecclésiastiques. Il a évi-
 demment fait le défendeur son légataire universel de tout ce
 qui lui restait.

Nous trouvons donc correct le jugement qui a débouté l'ac-
 tion, et nous le confirmons avec dépens.

Jugement confirmé.

Smith, pour les demandeurs.

F. X. Drouin, C. R., pour le défendeur.

COURT OF REVIEW

MONTREAL, June 29th 1906.

Present :—SIR MELBOURNE M. TAIT, Chief Justice, TASCHEREAU AND LORANGER, JJ.

REGAN v. THE MONTREAL LIGHT, HEAT & POWER COMPANY.

Liability for tort—Trial by jury—Verdict against weight of evidence—Neglect in following method of lighting, universally adopted—Absence of proof of fault.

HELD :—A verdict that an explosion was due to the neglect of the defendant company (a gas co.) because the room in which it occurred was lit at the time by ordinary gas jets and that the resulting death, for which damages were sought, was not in any way due to the negligence of the deceased, is not one which the jury viewing the whole of the evidence could not reasonably find, although it was established that the method of lighting held negligent is universally adopted, and there was no proof of any other fault in connection with the accident.

TASCHEREAU, J. *dissentiente*.

SIR M. M. TAIT, A. C. J. :—

The judge who presided at this jury trial has, by his certificate filed on record, reserved the case for the consideration of this Court.

The plaintiff, as widow of the late John Douglas, and as tutrix of her minor children, issue of her marriage with him, prays for a condemnation of \$25,000 against the defendant, alleging that her husband, on the 28th of October, 1904, was and had been previous thereto in perfect health; was forty-five years of age; was then in the defendant's employ as foreman in its works, at a salary of about \$110.00 per month; had been, previous to that date, in such employ for about thirty years;

was a careful and competent employee, and on that day, at about 5.20 p. m., while discharging his ordinary duties, entered the meter room of the Company, and while there lost his life by reason of a sudden and terrific explosion of gas, which wrecked the building and adjoining blow-room, and that this explosion was due to the fault of the defendant; (a) by lighting the said rooms at the time of the explosion by means of ordinary gas jets, instead of electric lights or other safe means of lighting; (b) by insufficient and antiquated ventilation of the rooms; (c) by reason of insufficient plant and machinery.

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The defendant admits the employment and salary, but ignores or denies the other allegations, and pleads that Douglas was foreman in charge of the building in which the explosion referred to in the declaration, took place, and that if there was anything insufficient or out of order in connection with the plant and machinery, it was his duty to have reported it, and caused it to be remedied, and that the explosion could only have been the result of his fault and negligence.

Upon motion of the plaintiff, the defendant was ordered to furnish particulars as to what constituted the fault and negligence of Douglas so alleged, and in compliance with that order, said that at the time of the accident he was alone in the building in which the explosion took place, and was in charge of it; that immediately afterwards a careful examination and inspection was made of the plant and machinery and everything was found in running order and in consequence the accident could only have been caused by his fault and negligence.

The plaintiff answered the plea by saying that although Douglas was in the employ of the defendants the buildings were under the control of one Skinner, their superintendent, and otherwise joined issue upon the plea and particulars.

The Jury brought in a verdict of \$12,500 against the defendant and in accordance with article 1056 C. C. determined the proportion of indemnity which each was to receive as follows :

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Regan	To Mary Margaret, aged 14	1,500.00
v.	To Thos Joseph, aged 12.....	1,500.00
M. L. H. &	To Gertrude Agnes, aged 10	2,000.00
P. Co.	To Grace Evelynne, aged 8.....	2,000.00
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	To Albert Edward, aged 3.....	2,500.00

and not allowing anything to William James, aged 20, and Charles Patrick, aged 18.

The following questions and answers are those which are material to the question of the responsibility of the defendant :

5th.—Was the late John Douglas a careful employee ?

A.—Yes.

6th.—Was the late John Douglas in charge of the building in which the explosion occurred ?

A.—Yes.

7th.—Was one Skinner in charge of the building in which the explosion occurred ?

A.—Yes.

8th.—Was the plant and machinery in use in the said building in perfect running order at the time the explosion occurred, and immediately afterwards ?

Three voted Yes, nine No.

9th.—If there was anything insufficient or out of order in connection with the said plant and machinery, was it the duty of the late John Douglas to report the fact and to have the same remedied, the same being within his knowledge ?

A.—Yes.

10th.—Was the said explosion caused by the fault and negligence of the said John Douglas ?

A.—No.

11th.—Did the fault and negligence of the late John Douglas contribute to the said accident ?

A.—No.

12th.—Was the explosion that occurred on or about the

28th October, 1904, caused by the fault, negligence, want of care and imprudence of the said defendant,

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(a).—By lighting the meter and blow rooms by ordinary gas jets ?

(b).—By insufficient and antiquated ventilation of the meter and blow rooms ?

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(c).—By insufficient plant and machinery ?

(a).—Nine voted Yes ; three No.

(b).—No.

(c).—No.

The defendant excepted to the Judge's charge to the jury, because he misdirected them (1) that whether they found something was not done that should have been done, that even though it was not the cause of the accident the defendant should be held responsible ; (2) that if they were satisfied that there was a leak in the plant, that they should say so, although no evidence whatsoever was made by the plaintiff as to the existence of any such leak, and (3) in stating erroneously the effect of the judgment of the Privy Council in the case of McArthur and the Dominion Cartridge Company. These exceptions were dismissed.

The plaintiff now moves for judgment in accordance with the verdict and the defendant moves that judgment different from the verdict be rendered in favor of the defendant, dismissing the action or ordering a new trial ; the grounds assigned being (1) because the answer of the jury to sub-question (a) of question twelve, is clearly against the weight of evidence ; that the sole grounds of negligence alleged against the defendant were set forth in said question twelve, and that it was established that the said method of lighting is adopted all over the world, and is in accordance with the best recognized practice, and because it was shown that the accident would have happened equally had the rooms been lighted otherwise ; (2) because the Judge misdirected the jury as set forth in the exceptions ; (3) because the amount awarded is grossly excessive ; (4) because no negligence had been found against the defendant.

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The facts which have generally to be determined in a case of this kind, whether tried by a judge alone or with a jury, are whether the accident was caused by the sole fault of the defendant or by that of the party injured or by their joint fault (in which case the damages are reduced according to the extent to which the plaintiff has contributed), and finally what constituted the fault whoever committed it.

In this case the jury, while finding that Douglas was in charge of the building in which the explosion occurred and that it was his duty to report anything insufficient or out of order in connection with the plant and machinery in order to have the same remedied, also find, in answer to questions ten and eleven, that the explosion was not caused by his fault, and that he did not contribute to the accident, and, at page eight of his factum, the defendant says :—" The questions were " answered in this manner by the consent of all the parties including the defendant's counsel. The cause of the accident " was not explained in any way whatsoever, and it would " have been as illogical to have found Douglas responsible, as it " was to find the defendant responsible.

If the defendant consented to these answers, I don't see how it can argue, as it does in its factum, that, if the jury had a right to find there was a leak notwithstanding the lack of evidence, Douglas was the man responsible for it, or to ask that any inference or presumption of fault or negligence for any cause should be found against him. It seems probable that it was on account of the defendant taking the view that the cause of the accident was not explained and, therefore, fault could not be found against either, that it did not accept the opinion of its witness, Giroux, the civil engineer, who in answer to a question put by the defendant's counsel, asking him if he had any explanation to offer as to how the accident occurred, said that he believed that Douglas must have taken one of the plugs out, meaning a plug placed at the back of the meter, and in the pipe bringing the gas to the jet photometer, etc, but examined Mr Skinner to establish that the gas could not have escaped in that way.

Somewhere on the afternoon of the day in question, about 5 o'clock, Mr Richard Ekins, the company's electrician, accompanied by Mr Wm Skinner, son of the superintendent, who was Ekins' assistant, entered the meter room for the purpose of starting the meter and fan, and while they were there, Douglas came in and gave permission to start the motor, which was done. Douglas then went out and was followed shortly afterwards by Ekins and Skinner. After their departure, Douglas returned to the meter-room, and had been there but a very short time when the explosion which caused his death took place, the exact minute being uncertain, but somewhere between 5.25 and 5.30 p. m. The buildings were demolished and shortly afterwards, the dead body of Douglas covered with *débris*, was found immediately in front of the dial of the clock, on the large meters which it was his duty to visit at that hour. The fact that Douglas was killed by an explosion of gas does not appear to be disputed, and, in any case, is established. How the gas got there is not explained.

Finding no fault or contributory negligence on the part of Douglas the jury had to determine if there was any fault on the defendant's part, and in what it consisted. I don't think the questions were framed in a manner best calculated to bring those points out. Two things are necessary to produce an explosion : (1) presence of explosive gas, and (2) a flame to ignite it. Both were in the meter room belonging to the defendant, when Douglas was killed.

The defendant says in its factum that there is absolutely no evidence as to how the gas came to be there, or as to how it came to explode. Proof may be made by presumption (art. 1205 C. C.), and is there not a presumption of fault by negligence against the defendant ? Nine of the Jury say in answer to question eight that the plant and machinery were not in perfect running order at the time of the explosion, and immediately afterwards, but they were not asked in so many words, in what respect they were defective ; whether there was a leak and whether there was any protection against one.

But in considering the circumstances of the case, and the

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charge of the Judge, can we arrive at any other conclusion than that the jury, in answering this question as they did, meant that there was an escape of gas and insufficient protection ?

Admitting that the machinery was in such a condition that the gas supplied to the city needed only to be turned off for a few minutes, and that such supply was in working order within half an hour of the accident, I don't think that this destroys the presumption that there was an escape of gas. The exercise of common ordinary sense leads to no other conclusion. In the destruction of the building, there must have been minor gas pipes broken or destroyed, for instance, might there not have been a leak from the gas jets which lit these rooms or from the pipes supplying them ? We have no evidence of what became of them when the walls were blown down by the explosion ; that the escape of gas is not accounted for does not, in my opinion, remove from the defendant its responsibility for it. The explosion gas should not have been there, and its presence not being attributable in any way to the fault of Douglas, must be attributed to some neglect on the part of the defendant.

The defendant further says in his factum that "the determining cause of the accident would, therefore, be the cause which permitted the escape of this gas, and what this cause was, is not in evidence, for the very good reason that nobody knows."

If the presumption of negligence is against the defendant for the reasons I have given, then its negligence was according to the defendant, the determining cause of the accident.

I now come to the question of the ignition of the gas, which may be called the secondary cause of the accident, if, as the defendant says, the primary or determining cause, was the cause which permitted the escape of it. Whatever may be said upon the question of imprudence in having open gas jets, there is no doubt the defendant must be held to have furnished the flame which ignited the gas, for any presumption that Douglas might have done so by lighting a match, or in any other way,

cannot be entertained, if he did not contribute to the accident. It is claimed that the finding that the explosion was caused by the imprudence of the defendant in lighting the meter and blow-rooms by ordinary gas jets, is against the weight of evidence, as it was established that this method of lighting is adopted all over the world, and is in accordance with the best recognized practices, and the defendant further contends that even if there was sufficient proof to sustain this finding, the question of negligence is not a pure question of fact, but is a mixed question of law and fact, and, therefore, we are still left with the question as to whether the facts found by the jury do, as a matter of law, constitute such negligence on the part of the company as to render it responsible in damages.

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I think the testimony of the defendant's witnesses shows that at one time gas jets were universally used for lighting the meter room, and that they are still used to a larger extent than electric light, but that the latter has, to a limited extent, replaced gas jets in recent years, and that even in Toronto and other places where gas jets may be used in meter-rooms, electric light is used in the purifying room, because there is more danger of an escape of gas; that in certain plants there are electric lights used even in the meter rooms, like in the Everett plant, and that where there is danger of explosion an electric light is much safer than an open gas light; that the meter-room has not been regarded as a dangerous place for the use of open gas jets, but where there is a leak, electric light is safer, while the testimony of the plaintiff's witnesses shows that lighting by gas jets is highly dangerous.

Article 501 C. C. P. enacts that a verdict is not considered against the weight of evidence, unless it is one which the jury, viewing the whole of the evidence, could not reasonably find.

This article which was not in the old code, in its present form, is evidently based upon the case of the *Metropolitan Railway vs Wright* (1) wherein Lord Halsbury said: "If rea-

(1) 11 App. Cas. 152.

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“sonable men “might find,” not “ought to”, “as was said in *Somon & Bitton* (1) the verdict which has been found, I think, no Court has jurisdiction to disturb a decision of fact, “which the law has confided to juries, not to judges.”

The Supreme Court of Canada, in a case of *Fraser vs Drew* (2) held that “Where a case has been properly submitted to “the jury and their findings upon the facts are such as “might be the conclusions of reasonable men, a new trial “will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that “the trial judge was dissatisfied with the verdict.

Notwithstanding this, the Chief Justice of the Supreme Court said : “ We are all of opinion that the appeal must be “dismissed with costs. If some English decisions favor the “appellant’s case, the weight of Canadian and American decisions are the other way. We decide this appeal on the “principle that the question of fact was left to and dealt “with by the jury in such a manner that we cannot interfere “with their findings. For precisely the same reasons as those “given by Mr Justice Henry, namely, that the finding of “fraud by the jury was not an unreasonable finding upon “the evidence, we think the verdict cannot be interfered “with.”

I don’t think that if the jury found the defendant guilty of imprudence in having open gas jets and that they were either the primary or secondary cause of the accident, that I can say such a finding is an unreasonable one.

The jury no doubt viewing the whole of the evidence, finding the circumstances proved justified a presumption that there was an escape of gas, and that it was present in the room in sufficient quantity and condition to cause an explosion if ignited, finding it proved that there were seven open gas jets in these rooms, and that there was an explosion,

(1) 8 Q. B. D. 176.

(2) 30 S. C. C. 241.

could they not reasonably find that such explosion was caused by the negligence and imprudence of the defendant? I think
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The kernel of the case seems to be this : That the defendant brought an explosive substance and a light to ignite it together and for so doing they are to blame. I don't think we can say this is an unreasonable verdict on this point, or that we can hold that the facts found do not, as a matter of law, constitute negligence which renders the defendant responsible.

In the case of *McArthur vs Dominion Cartridge Co.* (1), Lord MacNaughten said there was no direct evidence to show the explosion occurred through the fault and negligence of the company "by their neglect to supply suitable machinery" and "by their neglect to take proper precaution to prevent an explosion," and it was not in any way caused by the plaintiff's fault. In discussing the decisions in France, referred to by a learned Judge of the Supreme Court of Canada, which were said to be "unanimous in exacting proof of a fault which certainly caused the injury", the learned Judge having previously observed that "as to the cause of this explosion we are left entirely in the dark," Lord MacNaughten said : "It is enough to say that although the proposition for which they were cited may be reasonable in the circumstances of a particular case, it can hardly be applicable when the accident causing the injury is the work of a moment, and the eye is incapable of detecting its origin or following its course. It cannot be of universal application, or utter destruction would carry with it complete immunity — for the employer."

By Art. 1054, the defendant is responsible for damage caused by things which it has under its care, and this responsibility attaches only when it fails to establish that it was unable to prevent the act which has caused the damage.

(1) (1905) A. C. 72.

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I think, as a matter of law, that with regard to the presence of explosive gas in the meter-room or in other words to the escape of gas, there is a presumption of negligence against the defendant, and I agree with the defendant that this is the determining cause of the accident. We certainly cannot say, as a matter of law, that they could not have prevented it.

I have read the Judge's charge carefully. I do not think the exceptions against it are well founded. According to Art. 500 C. C. P. a new trial cannot be granted on the ground of misdirection unless some substantial prejudice has been thereby occasioned, which I do not find to be the case.

Lastly the defendant contends that the damages are so excessive as to justify a new trial being ordered.

By Art. 502 C. C. P. in order to grant a new trial, the amount awarded must be so grossly excessive that it is evident that the jurors have been influenced by improper motives or led into error. I don't see how any fault can be found with the amount awarded to the widow of \$1,000. If anything that is too little. With respect to the children some of them have been allowed more than I would have allowed them as a judge, but at the same time I don't think it is a case for the application of the principle laid down in the article that the jury were influenced by improper motives or led into error.

Upon the whole, the majority of the Court do not see their way to interfere with the verdict, but is of opinion that upon it the plaintiff, personally and as tutrix, is entitled to a judgment for the full amount awarded. The judgment is confirmed with costs.

TASCHEREAU, J., *dissentiens*.

Je regrette de ne pouvoir concourir dans le jugement qui vient d'être rendu par la majorité de cette cour, maintenant le verdict du jury.

Je n'ai pas parlé le premier, quoique ce soit l'usage pour le

juge dissident, car je voulais laisser à l'honorable juge en chef la tâche de rapporter les faits de la cause.

J'admets ces faits tels qu'ils ont été exposés, et je ne diffère que quant au résultat légal que ces faits doivent produire.

En pareille matière, quand il s'agit d'un procès par jury, il faut bien s'entendre sur les principes qui doivent guider la cour.

Il est élémentaire, dans la doctrine, que ce qui constitue *en loi* la faute, la négligence ou l'imprudence, n'est pas du tout du domaine du jury. Le jury n'a pas mission de dire, et on ne doit pas lui demander s'il y a faute. Lorsqu'un accident s'est produit, on ne doit pas laisser au jury la détermination de la faute; on doit simplement lui soumettre un état de faits, on doit lui demander s'il est vrai ou non que tel fait est établi, que tel acte d'omission ou de commission a été prouvé, et la cour, sur ces réponses du jury dira, comme *tribunal*, s'il y a quelque part faute, négligence ou imprudence. Le tribunal n'est pas lié par la déclaration d'un jury à l'effet qu'il y a faute, négligence ou imprudence dans tel ou tel acte; le jury ne doit et ne peut que constater *l'acte* ou le *fait*, et la cour décide s'il y a là faute. En droit donc, tout ce que l'on peut légalement demander aux jurés, c'est de dire si, dans leur opinion tel accident est dû à tel fait ou à telle omission, laissant à la cour de décider si tel fait ou telle omission constitue faute, négligence ou imprudence. Je ne crois pas qu'on puisse contester sérieusement ces principes qui ont été admis par la jurisprudence Anglaise et Américaine et je ne trouve pas dans les annales judiciaires une seule décision où ces principes aient été mis en question.

Voyons parmi les questions posées aux jurés, celles dont l'examen devient nécessaire aux fins de la présente discussion.

Il y en a d'irréprochables, et d'autres qui, d'après moi, violent tout à fait les principes que je viens d'exposer.

La cinquième question est en ces termes :

" Q.—Was the late John Douglas a careful employee ?

" A.—Yes. "

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C'était un employé de trente ans de service, un bon employé en effet.

Sixième question :

" Q.—Was the late John Douglas in charge of the building in which the explosion occurred ?

" A.—Yes."

Mais il faut comparer cette réponse à celle qui la suit :

Septième question :

" Q.—Was one Skinner in charge of the building in which explosion occurred ?

Et le jury répond encore à celle-là "Yes."

Ainsi, deux individus différents, John Douglas, la victime et Skinner, étaient tous deux, d'après le jury, également en charge de la bâtisse et responsables par conséquent de l'état d'icelle.

Pour bien comprendre comment ces questions ont pu être posées, il faut se rappeler que dans son plaidoyer, la compagnie défenderesse alléguait spécialement (et c'est une allégation des plus importantes) que John Douglas était, par la nature de ses fonctions, de son emploi, responsable de l'état de la bâtisse ; qu'il en était le gardien et qu'il était de son devoir, après ses visites constantes, ses inspections d'usage, de faire rapport sur l'état de cet édifice, afin que si quelque chose laissait à désirer, on pût y remédier de suite. *Le jury trouve que c'est vrai.*

En réponse à cette allégation de la défenderesse, on dit du côté de la demande : "Non, ce n'est pas Douglas qui était en charge de la bâtisse, c'était un nommé Skinner, le surintendant ; c'est lui qui en avait la responsabilité ; Douglas n'était qu'un subalterne, qui était responsable à Skinner, lequel était responsable à la compagnie".

En présence de ces affirmations contraires, le jury trouve que les deux étaient responsables : Douglas et Skinner.

Mais il reste le fait que Douglas était responsable, et qu'il devait faire rapport à la compagnie si quelque chose d'inusité et de dangereux se produisait dans la bâtisse.

Huitième question :—"Was the plant and machinery in use

" in the said building in perfect running order at the time
 " the explosion occurred *and immediately afterwards* ?" Question des plus absurdes ! Il est évident qu'après l'explosion, alors que tout était en pièces, les machines ne pouvaient pas être en bon état, et il n'est pas étonnant que neuf des jurés aient dit *non* ; il est plutôt surprenant, même, que trois d'entre eux aient pu dire "Yes", c'est-à-dire qu'immédiatement après l'explosion tout était en bon ordre. Si les mots "*and immediately afterwards*" disparaissent de la question, nous restons en présence de la première partie de la question, relative au mécanisme, à l'outillage. Était-il en bon état lors de l'accident ?

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Comparons cette réponse qui dit *non* à celle donnée à la douzième question.

Douzième question :—"Was the explosion that occurred on
 " or about the 28th October 1904, caused by the fault, negligence, want of care and imprudence of the Defendant ?"

(a) By lighting the meter and blow-rooms by ordinary gas jets ?

(b) By insufficient and antiquated ventilation of the meter and blow-rooms ?

(c) By insufficient plant and machinery ?

À la sous-section *c* il est répondu *non*, c'est-à-dire que l'accident n'est pas dû à l'état insuffisant, défectueux, du mécanisme et de l'outillage, réponse tout à fait contraire à celle qu'on a donnée en répondant à la question 8ème où on a trouvé que lors de l'explosion ce mécanisme et cet outillage n'étaient pas en bon ordre.

On ne peut concilier ces deux réponses, elles sont fatalement contradictoires.

Passons à la neuvième question. La réponse du jury à cette question est unanime.

Neuvième question :—"If there was anything insufficient
 " or out of order in connection with the said plant and machinery, was it the duty of the late John Douglas to report
 " the fact and to have same remedied, the same being within
 " his knowledge ?

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" A.—Yes."

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Cette réponse étant conforme à la réponse déjà donnée à la question sixième, il était donc du devoir de Douglas, dès qu'il s'apercevait de quelque chose de défectueux, de dangereux dans ces chambres, ces pièces, d'en faire rapport immédiatement et d'obvier lui-même à la difficulté ou au danger.

Dixième question :—"Was the said explosion caused by the fault and negligence of the said John Douglas ?

" A.—No."

J'ai déjà fait voir toute l'illégalité de cette question et de cette réponse.

Onzième question :—"Did the fault and negligence of the late John Douglas contribute to the said accident ?

" A.—No".—Même illégalité.

Douzième question déjà lue :—A la sous-section (a), 9 *Yes*, 3 *No* ; sous-section (b) *No*—sous-section (c), *No*.

Il ne reste donc, d'après le jury, qu'un élément de responsabilité celui de la sous-section (a) : "*By lighting the meter and blow-rooms, by ordinary gas jets.*" Dans l'admission de cette responsabilité, le jury s'est divisé : neuf "*Yes*", et trois "*No*."

Dans aucune de ces questions il n'est demandé au jury *quelle est la cause même de l'accident* ; ce n'est pas une cause d'accident, le fait d'y avoir eu des jets ou des robinets à gaz dans ces pièces ; quatre dans une et trois dans l'autre ; ce mode d'éclairage peut avoir été dangereux, d'après le jury, mais il n'est certainement pas la cause de la catastrophe. On ne demande pas même au jury *quelle est cette cause*. Cependant c'était la question essentielle du procès.

Mais le jury dit, et la cour dit après lui :—"On prend pour acquis qu'il y a eu une explosion ; on ne sait pas comment elle s'est produite, c'est mystérieux, mais elle a eu lieu, et c'est la faute de la compagnie défenderesse." Pourquoi ? Parce qu'elle avait des jets de gaz ouverts et allumés. Je le répète encore, ce n'est pas là une *cause*. La cause, c'est l'explosion. L'explosion reste mystérieuse plus que jamais. On n'a pas même demandé aux jurés la solution de ce mystère. Une fuite

de gaz pourrait l'expliquer. Mais la fuite de gaz n'a pas été établie, les jurés ne l'ont pas constatée, et leur verdict n'en parle pas.

Voilà tout le verdict sur lequel on va condamner la compagnie défenderesse à payer douze mille cinq cents piastres de dommages.

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Quels sont, en résumé, les faits prouvés ?

Les faits ne sont pas mystérieux, si l'explosion l'est :

Vers cinq heures de l'après-midi, Richard Ekins, électricien de la compagnie, et William Skinner, le fils du surintendant, se sont rendus dans une chambre dans laquelle se trouve un grand compteur enrégistrant la quantité de gaz fournie à la ville par la compagnie, et un petit compteur enrégistrant la quantité de gaz utilisée par la compagnie elle-même. Cette chambre est appelée "the meter-room". A côté de cette "meter-room", il y a la "blow-room", une pièce plus petite que l'autre où sont des soufflets pour activer la pression du gaz. Comme je l'ai dit tout à l'heure, il y avait quatre jets de gaz dans cette première salle la "meter-room", et trois becs de gaz dans la "blow-room".

Je disais donc que ces trois messieurs : Ekins, Skinner et Douglas lui-même, sont entrés à peu près dans le même temps, à cinq heures de l'après-midi, dans la "meter-room" ; ils ont eu quelques minutes de conversation là. On a demandé à Douglas s'il était temps de mettre le mécanisme en mouvement. Il a répondu affirmativement, et tout fut mis en marche. Alors, Douglas est sorti de la bâtisse, et il a été suivi peu de temps après par Ekins et Skinner, de sorte que personne ne s'est trouvé là pendant un certain intervalle. Les conversations entre Ekins, Skinner et Douglas dans la "meter-room" avaient pris quelque temps, et c'est vers cinq heures et vingt que Douglas est retourné seul dans la "meter-room". Il y est resté quelques instants. Personne ne peut dire ce qui s'est passé lorsque cinq minutes après son retour dans cette pièce (il était cinq heures et vingt-cinq, d'après les témoins) l'explosion s'est produite, une explosion formidable qui a ébranlé tout l'édifice : les murs ont été en partie détruits, les différen-

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tes pièces du mécanisme ont été jetées pêle-mêle dans les débris et ont été retrouvées ensuite éparses, mais non endommagées. Le dommage au mécanisme et à l'outillage fut si peu considérable que quelques heures après,—je crois que c'est trois heures après,—tout était remis en parfait ordre et en mouvement, et le gaz était fourni à la ville et par la compagnie, sans autre retard. Seuls les murs de la bâtisse étaient endommagés.

Il ne faut pas oublier que ces jets de gaz étaient allumés lors de l'explosion; qu'ils l'étaient lors de la visite de Ekins, Skinner et Douglas, à cinq heures. Ils sont restés allumés jusqu'au moment où Ekins, Skinner et Douglas sont sortis de la bâtisse après leur conversation. Alors, tout était en parfait état; il n'y avait pas de fuite de gaz; s'il y avait eu fuite de gaz, on l'aurait constatée facilement; s'il y avait eu fuite de gaz, Douglas n'aurait pas donné ordre de mettre les machines en mouvement. C'était un bon employé, "a careful employee," compétent, la preuve le démontre.

Une fuite de gaz, quel que soit son volume, prend un certain temps avant d'envahir complètement une pièce de cette grandeur. La demande prétend qu'il peut y avoir eu une fuite de gaz. Il n'y avait pas de fuite de gaz, évidemment, à cinq heures; il n'y en a pas eu à cinq heures dix, cinq heures et quart, car la conversation entre Ekins, Skinner et Douglas a pris au moins dix minutes, un quart d'heure. Par conséquent, à cinq heures et quart, tout était dans l'ordre. Est-ce à croire qu'entre cinq heures et quart et cinq heures et vingt-cinq, une fuite de gaz de ce volume aurait pris naissance et aurait rempli la meter-room? Ce n'est pas possible.

Il y a un témoin dans la cause qui fait entrevoir une cause possible de l'accident. Je crois que c'est le témoin Giroux, un des employés de la compagnie. On lui demande: "Pouvez-vous expliquer l'accident?" Eh bien, dit-il, je ne peux l'expliquer que d'une manière c'est que la victime Douglas aurait enlevé ou ouvert un des robinets qui se trouvait en arrière du grand compteur. Il y avait là en effet un ou deux tuyaux conduisant le gaz au sommet du compteur et il y avait au moins un robinet

attaché à ce tuyau. On ne pourrait s'expliquer l'explosion que par le fait que Douglas aurait enlevé complètement ou bien aurait ouvert le robinet et l'aurait laissé ouvert pendant un certain temps. Alors, le gaz se serait précipité avec une très grande force et aurait envahi l'appartement très vite. Ceci serait facile à comprendre, réellement la seule explication possible.

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Il n'y avait pas de fuite de gaz dans les tuyaux même, l'outillage était en parfait état, les conduits étaient parfaitement étanches ; cela a été démontré après l'accident. Il n'y a donc qu'une imprudence grossière, une maladresse inconcevable de Douglas lui-même, qui aurait pu déterminer cet envahissement subit et rapide de la motor-room par le gaz laissé libre par sa faute, puis l'explosion qui a suivi.

C'est la seule explication plausible qui ait été offerte, et rien n'explique autrement cet accident qui est resté mystérieux et qui l'est encore.

Est-ce que la compagnie doit être tenue responsable et payer un dommage de \$12,500. à la famille de la pauvre victime, parce que l'on ne peut pas constater autrement la cause de l'accident ?

On a décidé, dans la cause de McArthur et The Dominion Cartridge Company, au Conseil Privé, sur la réponse du jury que le mécanisme n'était pas en bon ordre et laissait à désirer ; il y avait donc là une forte présomption contre la compagnie à l'effet que l'accident était dû à la défectuosité des machines ; mais ici, rien de tel. La preuve démontre que les machines et l'outillage étaient en parfait état, et ce qui a été constaté après l'accident confirme la chose. Il n'y avait pas de fuite de gaz possible par la défectuosité des tuyaux, dans un temps très court on a pu reconstituer tout le mécanisme et remettre tout en action, sans que le service en ait souffert.

Je considère qu'il y a une grande différence entre la cause de McArthur et la cause actuelle, parce qu'ici il n'y a pas cette réponse du jury ; dans la cause actuelle, on constate que le mécanisme et l'outillage étaient en parfait état. Je le répète :

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Est-ce parce que l'accident est mystérieux qu'on peut dire à la compagnie : "C'est votre faute à vous ?"

Mais elle peut répondre : "Douglas était en possession de ma bâtisse, il était mon gardien, comme tel responsable de l'état des lieux, de la condition du matériel,—le jury l'a dit ; s'il y avait quelque chose de dangereux, c'était à lui de le signaler immédiatement." On le voit entrer à cinq heures, en compagnie de deux autres employés de la compagnie, il donne ordre de mettre les machines en mouvement, cet ordre est exécuté, il sort de la bâtisse, y retourne cinq ou six minutes après, et l'explosion se produit.

Qui est responsable ? Est-ce ce vieux serviteur de trente ans, qui a dû, par imprudence ou maladresse, enlever ou ouvrir ce robinet, remplir ainsi dans un si court espace de temps toute la pièce d'un volume de gaz aussi considérable et causer ainsi une explosion aussi formidable ? Ou bien, est-ce la compagnie elle-même, qui n'est pas en faute, si ce n'est, d'après les jurés, pour avoir tenu des becs de gaz dans les chambres de sa bâtisse, élément de faute bien douteux, d'après la preuve ?

Le seul responsable n'est-ce pas plutôt celui que les jurés indiquent eux-mêmes, en le tenant responsable de la garde et de l'entretien de l'édifice ?

La présomption est contre lui, d'abord parce qu'il était le gardien, ensuite parce que son cadavre a été trouvé dans les débris, près du compteur et du robinet qu'il a dû ouvrir lui-même, puisque le gaz n'a pu sortir que par là. Que faisait-il là, auprès du seul instrument dangereux que lui seul pouvait manier, en ce moment ?

Je dois répéter ce que j'ai dit en commençant : la question de faute n'est pas du domaine du jury. Je refuse d'accorder au jury le droit de dire que quelqu'un est en faute ; c'est au tribunal seul à le dire. Je ne reconnais au jury que le droit de constater un certain état de faits, de dire, en réponse à une question : oui, telle chose est arrivée, tel acte a été commis ; et la cour, là-dessus, basera les conclusions légales qu'elle doit en tirer.

Cela étant, les réponses, d'ailleurs contradictoires du jury, ne sauraient lier la cour, et je vois même dans ces réponses tout ce qu'il faut pour justifier le renvoi de l'action.

Je fais enregistrer mon dissentiment.

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Filion & Butler, for the plaintiff.

A. R. Oughtred, K. C., Counsel.

Montgomery & Lacoste, for the defendant.

R. C. Smith, K. C., Counsel.

COUR DE RÉVISION

QUÉBEC, 31 octobre 1906.

Présents :—LANGELIER, juge en chef suppléant, LEMIEUX ET
SIR C. A. P. PELLETIER, JJ.

PERREAULT v. LA CORPORATION DE LÉVIS &
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*Procédure—Injonction interlocutoire—Jugement interlocu-
toire—Jugement susceptible de révision.*

Juré :—Le jugement sur une injonction émise dans une action en nullité d'une résolution d'un conseil municipal n'est pas un jugement final au sens du § 1 de l'art. 52 C. P. C. et n'étant pas un de ceux visés aux §§ 2, 3 et 4, n'est pas susceptible de révision.

Le jugement ci-après confirme le jugement de l'honorable juge Larue, siégeant à Québec.

LEMIEUX, J. :—

La seule question que ce tribunal déterminera est celle de savoir si le jugement dont on demande la révision est un jugement final susceptible d'appel à cette cour, aux termes de l'art. 52 C. P. qui déclare qu'en dehors des cas mentionnés aux paragraphes 2, 3 et 4, il n'y a appel que d'un jugement final de la Cour Supérieure.

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Si le jugement dont on se plaint ici est un jugement final, l'appel est bien pris ; si, au contraire, c'est un jugement interlocutoire, préparatoire ou provisoire, l'appel doit être refusé, car, en pareil cas, la loi ne permet pas l'appel et rend ce tribunal incompetent, *ratione materiæ*, à le juger.

Cette question ne peut être élucidée qu'en rappelant succinctement la nature de la cause et le caractère des procédures qui ont provoqué le jugement.

Le 9 juillet dernier, le conseil de la ville de Lévis a adopté une résolution décrétant la tenue d'une élection pour remplir une charge d'échevin devenue vacante par jugement de la Cour Supérieure.

Perreault, le demandeur, prétend par son action que cette résolution est illégale et demande qu'elle soit annulée.

Le jour même de l'institution de l'action, Perreault a obtenu d'un juge de la Cour Supérieure une injonction interlocutoire enjoignant à la ville de Lévis de ne pas procéder à l'élection ordonnée par la résolution contestée.

Sur cette poursuite la ville de Lévis s'en est rapportée à justice.

Fournier, un des contribuables pour le quartier où l'élection devait avoir lieu, a produit deux interventions, l'une dans la requête pour injonction, et l'autre, dans l'action,—demandant, pour des motifs à peu près analogues, dans un cas, le renvoi de la requête pour injonction et, dans l'autre, celui de l'action.

La contestation a été liée pendant la vacance, mais seulement sur l'intervention dans la requête pour injonction.

Après inscription pour enquête et mérite, jugement a été rendu, le 28 août dernier, cassant l'ordonnance d'injonction à la ville de Lévis de ne pas procéder à l'élection.

Perreault demande la révision de ce jugement.

Ceci nous amène à faire des distinctions et à donner la définition que nous empruntons aux auteurs les plus accrédités, du jugement définitif ou final et des jugements préparatoires, interlocutoires et provisoires.

Rousseau et Laisney, ainsi que Rogron et Boitard nous en-

seignent que le jugement définitif est celui qui termine la contestation quant au tribunal qui l'a rendu.

Le jugement préparatoire est celui par lequel le tribunal ordonne une mesure d'instruction et qui tend à mettre la cause en état de recevoir une solution définitive, mais sans préjuger le fond, c'est-à-dire sans indiquer à l'avance le sens de la solution définitive qui interviendra. Tels sont les jugements de remise de cause, de jonction de deux instances ou bien encore le jugement ordonnant un délibéré ou une instruction par écrit.

Le jugement interlocutoire est celui par lequel le tribunal ordonne certaines mesures d'instruction pour se mettre en état de statuer sur le fond du débat et qui, par sa nature, révèle implicitement la décision qu'il rendra sur le fond, c'est-à-dire qui préjuge la solution définitive. Est réputé interlocutoire tout jugement qui préjuge le fond, soit par l'instruction qu'il ordonne, soit par toute autre décision qu'il prononce. Tel est le jugement qui déclare impertinents les faits allégués dans une action, malgré la prétention contraire.

Enfin, le jugement provisoire est celui par lequel le tribunal pourvoit à certains intérêts qui resteraient en souffrance ou se trouveraient compromis pendant le cours de l'instruction de la cause. Ces jugements décident actuellement et par provision certaines questions détachées de la cause principale et qui présentent un caractère spécial d'urgence. Est un jugement provisoire, celui qui ordonne la nomination d'un séquestre au cours d'une instance, ou qui accorde à une femme plaidant en séparation de corps une pension alimentaire.—(Rousseau & Laisney, Vo Jugement, Nos 1 à 35 ; —Boitard, Vol. I, p. 252, No 240 ; —Rogron, Vol. I, Vo Jugement, p. 409).

Maintenant, dans quelle catégorie de ces jugements doit être classé le jugement *a quo*, qui, au cours de l'instance, a cassé une ordonnance d'injonction à la ville de Lévis de ne pas procéder à une élection municipale ?

Ce jugement portait entièrement sur une mesure provisoire, sur une injonction, c'est-à-dire sur un remède légal donné

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à une partie pour empêcher la commission d'une action ou opération pendant un temps, à savoir pendant l'instance.

Cette injonction est une mesure provisoire ou conservatoire et n'est que l'accessoire d'une poursuite ou demande en justice, suivant l'opinion exprimée par Sir L. N. Casault dans *McArthur & Coupal* ⁽¹⁾.

"Les commissaires,—dit le savant juge,—qui ont fait le "code de procédure disent dans leur rapport qu'ils ont voulu "étendre le champ d'action de ce recours utile, et ils l'ont de "fait considérablement élargi, tout en n'en faisant qu'un accessoire d'une poursuite ou demande en justice."

Le savant juge Andrews s'exprimait comme suit, sur le même sujet : —

"Thus, our present code has abolished the writ of injunction "as a principal demand and has made of it a proceeding accessory to an ordinary action ; just as a writ of *arrêt-simple* "or revendication are accessory to the action in which they "are taken. Its object and mission are conservatory, as is "theirs."

L'injonction n'est donc qu'une mesure provisoire qui ne sert aucunement à vider le fond du litige ou à déterminer les droits des parties. C'est une procédure greffée à l'instance, soit à son origine, ou au cours du procès ; elle est faite et adoptée seulement pour la conservation temporaire d'un droit. Ce n'est qu'un incident de la cause, c'est-à-dire, comme l'écrit Carré, "un événement qui survient pendant le cours de l'instance "et pour lequel, quelquefois, il devient nécessaire de suivre des "règles particulières soit d'instruction, soit même de jugement."

L'injonction n'est donc pas l'instance, ni le procès qui comporte la série de procédures judiciaires ayant pour objet de saisir le tribunal d'une contestation, d'instruire la cause et d'obtenir finalement un jugement qui doit vider le débat.

(1) 16 C. S. 524.

Dans ces conditions, le jugement qui a cassé l'ordonnance d'injonction à la ville de Lévis de ne pas procéder à l'élection en question, est un jugement provisoire et n'a aucune influence sur le jugement définitif ou final ; c'est un jugement qui pourra être rétracté par le juge qui l'a rendu, suivant l'ancienne maxime que l'interlocutoire ou provisoire ne lie pas le juge, maxime que l'honorable juge Cyrias Pelletier et Sir L. N. Casault ont formellement appliqué, dans une cause récente, de manière à fixer la jurisprudence.

Notre conviction sur ce point s'est accrue à la suite du puissant argument présenté par l'avocat de l'appelant à l'effet qu'une intervention ne peut avoir lieu dans une procédure incidente, mais seulement dans un procès,—aux termes de l'art. 220 C. P.

Pour ces motifs, nous concluons que le jugement en question est un jugement provisoire et qu'il n'y avait pas lieu d'en appeler devant la Cour de Révision.

L'appel doit être rejeté. Mais vu que cette objection a surgi dans le cours du délibéré et n'a pas été invoquée par l'intimé, ni dans son factum, ni dans la plaidoirie orale, nous décidons que chaque partie paiera ses frais en Cour de Révision.

Belleau, Belleau & Belleau, procureurs du demandeur.

Chs Darveau, C. R., procureur de la défenderesse.

Alphonse Bernier, C. R., procureur de l'intervenant.

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COUR SUPÉRIEURE.

ARTHABASKA, 15 octobre 1906.

Présent :—MALOUIN, J.CROTEAU v. THE ARTHABASKA WATER & POWER
COMPANY & BOYLE, intvt.

*Responsabilité—Committants et préposés—Surintendant de
compagnie industrielle—Dénonciation en justice d'em-
ployés pour offenses criminelles—Action en dommages
pour dénonciation calomnieuse—Garantie simple—
Droit d'intervention—Cause probable.*

JUGÉ :—1o. Le surintendant d'une compagnie industrielle agit à l'occasion de son service ou de son mandat en traduisant les journaliers qu'elle emploie devant les tribunaux correctionnels sous prévention de désertion de leur service et d'obtention d'argent sous de faux prétextes. Par suite, s'il le fait sans cause et par malice, il engage la responsabilité de ses committants. A ce titre, il est leur garant simple et a le droit d'intervenir, pour la contester, dans la poursuite dirigée contre eux par les accusés en recouvrement de dommages pour dénonciation calomnieuse.

2o. Le surintendant d'une compagnie industrielle à qui un contre-maître fait rapport que des journaliers employés par elle ont déserté leur service et obtenu de l'argent sous de faux prétextes, agit avec cause probable en les traduisant devant les tribunaux sous prévention de ces offenses.

MALOUIN, J. :—

Il s'agit d'une action en dommages intentée contre la défenderesse par le demandeur pour rupture de contrat et fausse arrestation.

Dix actions semblables ont été intentées par dix demandeurs différents et dans chaque action, A. C. Boyle, le surintendant de la compagnie défenderesse est intervenu. La défenderesse et l'intervenant ont contesté chaque action séparément, invoquant des moyens différents.

La preuve faite dans cette cause a été, de consentement, déclarée commune à toutes les autres causes.

Ce sont les mêmes questions qui se présentent dans toutes les causes. On ne m'a soumis que celle-ci.

La compagnie défenderesse fait le flottage du bois sur la rivière Nicolet, depuis Ham jusqu'à Victoriaville, où elle a ses scieries. Au printemps de 1904, le surintendant de la défenderesse a engagé le demandeur et plusieurs autres hommes de Bécancourt, au nombre de quinze environ, pour faire le flottage du bois sur cette rivière pour la compagnie défenderesse. Ils partirent de Bécancourt le 8 avril, et le 10 avril au matin, rendus à Ham depuis la veille au soir, ils commencèrent à travailler. Ils étaient payés deux piastres par jour et nourris; le 15 avril au matin, cinq hommes avaient été congédiés. Les autres hommes étaient partis du camp peu après cinq heures du matin pour se rendre à l'ouvrage; rendus à l'endroit du travail, comme il n'y avait pas assez d'eau dans la rivière pour effectuer le flottage (le flottage se faisait par éclusées) ils allumèrent des feux auprès desquels ils se tenaient en attendant le moment propice. Vers sept heures du matin, les cinq qui avaient été déchargés les rejoignirent et leur apprirent qu'ils avaient reçu leur congé et qu'on ne leur allouait que \$1.50 par jour. Ils les quittèrent en disant qu'ils se rendaient auprès du surintendant, M. Boyle, afin d'être payés \$2.00 par jour, tel que convenu. Quelques instants après, ils rencontrèrent le capitaine Dion, l'un des contremaîtres de la compagnie à qui ils firent part du fait qu'on ne voulait leur payer que \$1.50 par jour. Dion leur dit : venez avec moi, je vais régler votre réclamation. Dans le même temps un nommé Proulx alla avertir les autres, qui attendaient près des feux, que le capitaine Dion était prêt à les payer. Tous se rendirent auprès de Dion qui, dans le temps, était près de la chute. Dion les invita à se rendre au Rollway et là les fit appeler l'un après l'autre pour les payer. Le premier appelé fut le demandeur Luc Croteau. Dion lui présenta \$12.00 pour six jours à \$2.00 par jour. Croteau insista pour que la journée du 14 avril fut payée, parce que, disait-il, elle était com-

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mencée, et Dion lui donna encore \$2.00. Tous les autres reçurent le même montant, à savoir \$14.00, même un jeune homme qui n'était pas de Bécancourt, un nommé Joseph Lacourse, engagé au prix de \$1.25 par jour, fut, comme les autres, payé \$2.00 par jour. Ils ont aussi exigé une pareille somme de \$14.00 pour le cuisinier qui n'était pas présent. Dion l'a payé à l'un d'eux pour qu'il lui remit la somme.

Le capitaine Dion jure qu'il a payé sous l'empire de la crainte et des menaces qu'on lui a faites de le jeter à l'eau, s'il ne payait pas. D'autres témoins produits de la part de l'intervenant corroborent le témoignage de Dion sur plusieurs points importants.

Tous les demandeurs et d'autres témoins entendus de la part de ces derniers jurent que Dion a payé librement et sans qu'aucune menace lui fut faite.

Le capitaine Dion a communiqué à A. C. Boyle, le surintendant de la compagnie défenderesse, ce qui venait de se passer. Dion lui avait donné sa version de l'affaire. Il lui a raconté les faits tels qu'il les comprenait lui-même. Boyle, évidemment de mauvaise humeur, armé d'un revolver, vint à leur rencontre ; ils descendaient tous ensemble dans une grande voiture se rendant à Victoriaville. En les voyant il sortit son revolver et le pointant dans leur direction, il les mit en demeure de restituer l'argent qu'ils avaient obtenu, disait-il, sans droit. Sur leur refus, il se rendit à Arthabaska, fit une déposition assermentée contre dix d'entre eux, devant un juge de paix, les accusant d'avoir déserté le service de la compagnie, et d'avoir obtenu illégalement de l'argent en menaçant un employé de la compagnie de violence corporelle. Des mandats furent émis par le juge de paix et confiés à un constable qui se rendit à Victoriaville et effectua les arrestations. Rendus à Arthabaska, ils furent tous admis à caution. Les procès furent fixés au mois de mai ; avant l'audition, Boyle renonça à sa plainte pour désertion de service et l'on procéda sur l'autre chef.

Le magistrat, après preuve et audition, renvoya les plaintes et acquitta les accusés.

Après l'acquiescement, les dix accusés intentèrent chacun une

action en dommage contre la défenderesse au montant de \$199.00 chacune pour rupture de contrat et fausse arrestation. Comme je l'ai dit plus haut, c'est l'action de Luc Croteau qui n'est présentement soumise.

La défenderesse a comparu par procureur et a plaidé que son surintendant A. C. Boyle n'avait pas été autorisé à prendre contre Luc Croteau les procédures qu'il a prises ; qu'il a agi pour son propre compte, à ses risques et périls et qu'il en est seul responsable.

A. C. Boyle est intervenu dans la cause et allègue entre autres choses :

“ Que ce n'est pas la défenderesse qui a fait faire la dite arrestation, mais bien l'intervenant qui a agi de son propre chef, hors la connaissance et sans aucune instruction de la défenderesse ; que lorsque le dit intervenant a fait faire la dite arrestation, il l'a fait faire avec cause probable et suffisante et qu'il était tout à fait justifiable de porter sa dite accusation, attendu que le dit demandeur s'était fait payer au moyen de menaces et de force une somme de \$14, laquelle il n'avait pas de droit de se faire payer.”

Si le plaidoyer de la défenderesse est bien fondé, Boyle, le surintendant de la compagnie, n'a pas d'intérêt à intervenir ; dans ce cas, l'action doit être renvoyée, sans qu'il soit besoin de plaider cause probable, car il n'est nullement nécessaire de justifier l'acte de l'employé dont la défenderesse n'est pas responsable. Par voie de conséquence, si le plaidoyer de la défenderesse est bien fondé, l'intervention de Boyle doit être rejetée. D'un autre côté, si le plaidoyer de la défenderesse est mal fondé, c'est-à-dire si la défenderesse est responsable, Boyle étant son garant, doit être reçu à intervenir.

La défenderesse est-elle responsable de l'acte de son surintendant dans les circonstances ci-dessus relatées et peut-elle être recherchée en dommages, s'il n'y a pas cause probable ?

Je suis d'opinion qu'elle en est responsable. A. C. Boyle est à Victoriaville le principal employé de la défenderesse, il a là la gestion entière et complète de ses affaires. L'arrestation a été faite à l'occasion de l'exercice de son mandat. Il

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a fait arrêter le demandeur pour avoir déserté le service de la compagnie et pour avoir obtenu illégalement des gagés de l'un de ses employés.

Voici ce que nous lisons dans "Fuzier-Herman" Répertoire Vol. 31, verbo Responsabilité Civile, No 668 : "Pour que la responsabilité du maître ou commettant soit engagée par les actes de ses domestiques ou préposés, il est nécessaire que ces actes aient été accomplis dans les fonctions qui leur étaient confiées, et qu'ainsi ils rentrent dans la catégorie de ceux soumis à la surveillance et à la direction des maîtres et commettants."

"No 669. — Mais cette nécessité d'un acte de la fonction ne doit pas être comprise dans un sens trop étroit ; il suffit que cet acte se rattache à l'exécution du mandat que comporte la qualité de domestique ou de préposé, qu'il ait eu lieu à l'occasion de ce mandat."

Laurent, Vol. 20, No 53, dit: "On voit par cet exemple, que le maître est responsable du dommage causé par son préposé, alors même que le fait n'a eu lieu qu'à l'occasion de service confié au préposé ;" et au No 584, il ajoute : "La jurisprudence est dans le sens de notre opinion. Il nous faut entrer dans quelques détails pour faire connaître la jurisprudence Une action en responsabilité est dirigée contre une compagnie du chef de propos diffamatoires reprochés à ses agents. La compagnie objecte ce que l'on dit dans l'opinion que nous combattons : que ses agents ont agi contrairement à ses instructions formelles, donc en dehors de leur mandat et, par conséquent, de leurs fonctions. Non, dit la Cour d'Orléans, il suffit que les faits des préposés se rattachent à l'objet de leur mandat et aient eu lieu à l'occasion de son exécution, pour que les commettants soient responsables."

Voir Baudry-Lacantinerie, Vol. 3, Obligations, deuxième partie No 2911. Sourdat. De la Responsabilité Vol. 2, No 901. 5, Larombière, sous l'art. 1384, Nos 8 et 43.

J'en conclus donc que le plaidoyer de la défenderesse est mal fondé et je le rejette avec dépens, c'est-à-dire avec les

frais de la contestation occasionnée par le plaidoyer de la défenderesse.

Etant arrivé à la conclusion que le plaidoyer de la défenderesse, déclinant la responsabilité de l'acte de son préposé, est mal fondé. Je décide que l'intervenant Boyle avait un intérêt suffisant pour intervenir et plaider à la dite action. Les faits qu'il allègue dans son intervention sont suffisants pour donner ouverture à sa demande ; il allègue qu'il est l'auteur du fait dont on se plaint. Pourtant, il est le garant de la défenderesse et à ce titre a le droit incontestable d'intervenir. 20, Laurent N^o 622 : " Si la partie lésée agit contre la personne responsable, celle-ci aura-t-elle un recours contre l'auteur du fait ? L'affirmative n'est pas douteuse. La personne responsable paie la dette de l'auteur du fait dommageable, elle doit donc avoir un recours contre lui, il ne faudrait pas induire de là que les personnes responsables soient des cautions ; elles sont tenues personnellement en vertu d'une présomption de faute, donc elles sont débitrices principales."

Voir aussi Larombière, Vol. 5, sous art. 1384, No 43, art. 220 C. P. C. 26 R. C. Suprême, p. 176.

L'intervenant à l'audition de cette cause a admis que la défenderesse était responsable de son acte, et que, si l'action était fondée, jugement devait intervenir contre elle.

Mais le plaidoyer de cause probable fait par l'intervenant est-il fondé ?

Il est de jurisprudence constante qu'une action en dommages pour fausse arrestation ne peut être maintenue à moins qu'il ne soit établi que l'arrestation a été faite sans cause probable et malicieusement.

L'intervenant était le premier employé de la compagnie à Victoriaville, c'est lui qui avait le contrôle et la surveillance du flottage du bois. En apprenant ce qui s'était passé de la bouche du capitaine Dion, il était sans doute convaincu de la culpabilité des accusés, et c'est sous l'empire de cette conviction qu'il a fait arrêter le défendeur et ses compagnons.

Je suis d'opinion qu'il y avait cause probable et que par conséquent l'action du demandeur doit être renvoyée.

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En lisant la preuve attentivement on ne peut dégager son esprit de l'impression qu'il y a eu des menaces de faites et que le capitaine Dion a payé au moins une partie de l'argent sous l'empire de la peur causée par des menaces qui lui ont été faites par les demandeurs. Autrement, comment expliquer le paiement fait au jeune Lacourse de \$2.00 par jour quand, de son propre aveu, il était engagé à \$1.25, et aussi comment expliquer le paiement intégral fait aux cinq hommes qui avaient été déchargés le matin, eux qui ne réclamaient pas le paiement de la journée du 14 avril.

Je suis également d'opinion que le demandeur n'a pas droit aux dommages qu'il réclame pour son renvoi.

La preuve n'est pas claire quant à ce renvoi, il y a quelque chose de resté inexpliqué à ce sujet ; néanmoins il y a une chose qui paraît certaine, c'est que le demandeur et ses compagnons ont consenti à partir ; en apprenant de la bouche de Proulx que Dion payait, loin d'opposer aucune résistance, ils se sont rendus sur les lieux, ont accepté le paiement de leurs gages, même d'après certains témoins, ont forcé le paiement de la journée du 14 avril, ainsi que le paiement des gages du cuisinier qui était absent.

Pour ces raisons, je maintiens le plaidoyer de l'intervenant et renvoie l'action du demandeur, avec dépens.

Perrault & Perrault, procureurs du demandeur.

Crépeau & Mailhiot, procureurs de la défenderesse.

J. E. Méthot, procureur de l'intervenant.

COUR DE RÉVISION

MONTRÉAL, 29 septembre 1906.

Présents :—SIR M. M. TAIT, juge en chef, TASCHEREAU ET
PAGNUELO, JJ.

DESCHAMPS v. BERTHIAUME.

*Responsabilité—Celle du père pour le dommage causé par son
enfant mineur—Preuve qu'il n'aurait pas pu empêcher
le fait.*

Jugé :—Lorsque dans une action contre le père en recouvrement des dommages causés par son enfant mineur, il y a preuve que le fait est survenu par accident sans intention malicieuse pendant que l'enfant jouait avec la victime, un camarade habituel, sous les yeux de la mère de ce dernier, alors que ses parents avaient raison de le croire suffisamment surveillé ; que du reste cet enfant, quoique turbulent, n'a pas de mauvais instincts et a été élevé d'une façon convenable, cette preuve suffit pour établir que le père poursuivi n'aurait pas pu empêcher le fait imputé et, partant, pour dégager sa responsabilité.

Le jugement inscrit en révision et qui est infirmé, a été rendu en Cour Supérieure, TELLIER, J., le 12 juin 1905, comme suit :—

TELLIER, J. :—

Le demandeur, tant personnellement que comme tuteur, réclame du défendeur la somme de \$990, et allègue dans sa demande formée le 15 mars 1904, que le 6 juillet 1903, son fils Alfred, âgé de six ans a été grièvement blessé par Lucien, enfant âgé de neuf ans, fils du défendeur ; que le dit jour, à Montréal, rue Laval, près de la résidence du demandeur, Lucien Berthiaume a, malicieusement, imprudemment, sans cause ni raison, lancé une pierre à la tête du petit Alfred Deschamps, atteignant ce dernier à l'œil droit et lui infligeant une blessure très grave ; que de fait et comme conséquence de la blessure ainsi infligée, Alfred Deschamps a complètement perdu l'œil droit et que l'œil gauche a été sensiblement affecté, l'est en-

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core et le restera à un degré considérable ; qu'il a souffert et souffre encore de vives douleurs qui lui résultent de la blessure reçue ; qu'il a éprouvé et éprouve une gêne et une douleur constantes à l'œil atteint et aussi parfois à l'œil sain ; que l'extrême gravité de la blessure reçue qui a entraîné la perte de l'œil atteint, aussi bien que de ses conséquences pour l'autre œil, a fait éprouver à Alfred Deschamps des dommages considérables qui ne peuvent être évalués à moins de \$800 ; que le demandeur a dû s'imposer des dépenses, déboursés, soins et dérangements considérables pour faire subir à son fils blessé un traitement approprié à la nature de la blessure ; que les dépenses occasionnées par le traitement médical, les frais pharmaceutiques, les soins *extra* nécessités et requis par l'état du malade et les exigences particulières du traitement à faire suivre, ainsi que les déplacements en chars ou en voiture occasionnés par ce traitement et la perte de temps s'y rattachant, représentent pour le demandeur une somme de \$190. qu'il est bien fondé à réclamer personnellement du défendeur à titre de dommages-intérêts lui résultant de l'enfant du défendeur ; que cette somme de \$190.00, jointe à celle de \$800.00 que le demandeur *es-qualité* de tuteur à son fils mineur est également bien fondé à réclamer du défendeur, forme en tout celle de \$990 ; et que le défendeur est responsable envers le demandeur agissant aux présentes tant personnellement qu'en sa qualité de tuteur, des dommages ci-dessus indiqués.

Le défendeur niant les allégations de la demande, allègue, dans sa défense, qu'il est faux que son fils, en aucun temps, ait lancé une pierre à la tête du fils mineur du demandeur : que ce dernier laissait son fils mineur, alors à peine âgé de cinq ans, aller jouer seul sur la rue, passant une partie de ses journées avec d'autres enfants, sans contrôle aucun et sans que ni le père, ni la mère l'eussent sous leur surveillance ; que l'enfant du défendeur allait également jouer dans le voisinage immédiat du domicile de son père ; et si un projectile quelconque a été lancé par le fils du défendeur, il ne l'a jamais été à l'adresse du fils mineur du demandeur, mais en jouant, sans but malicieux, sans aucunes instructions quelconques de la

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part du défendeur ou de sa mère à cet effet ; mais le défendeur nie que son fils mineur ait en aucune circonstance lancé aucun projectile à la date mentionnée dans la déclaration ni à aucune autre date ; que d'ailleurs le fils mineur du défendeur a été bien élevé, a reçu une bonne éducation ; que ses parents lui ont toujours dit de ne pas être brutal à l'adresse de ses compagnons, et que de fait le fils du défendeur n'a jamais commis aucune brutalité, ni aucune imprudence du genre de celle qu'on lui reproche ; que, d'ailleurs, la mère du fils mineur du demandeur aurait admis qu'à la date de l'accident différents enfants jouaient ensemble et que ce n'est pas par exprès, ni malicieusement que le projectile qui a frappé son fils, lui aurait été lancé, mais en jouant, par mégarde ; que, dans ces circonstances, il ne saurait y avoir de responsabilité et que l'action du demandeur es-qualité doit être renvoyée.

Il est constant par la preuve que le 6 juillet 1903, le jeune Alfred Deschamps se trouvait avec sa mère, à la porte de la maison du demandeur, lorsque survint, avec d'autres enfants, le jeune Lucien Berthiaume portant des pierres dans sa casquette ; que celui-ci se mit à l'instant à lancer des pierres à un de ses camarades qui fut atteint par la première pierre ; qu'il lui en lança une seconde qui, frappant à l'œil droit le jeune Alfred Deschamps, lui fit une lésion d'où résulta la perte de cet œil, une appréhension éventuelle pour l'autre œil, et un préjudice grave pour la victime et pour son père.

Le jeune Lucien Berthiaume est représenté comme étant alors léger, étourdi, dissipé et turbulent, mais comme n'étant ni méchant, ni vicieux ; que ses parents faisaient tout ce qui dépendait d'eux pour le bien élever, et lui procurer dans la famille et à l'école une bonne éducation, pour le réprimer au besoin et lui inspirer de bons sentiments, mais que, souvent, ils l'abandonnaient à lui-même et le laissaient sans surveillance dans les rues.

Le père est responsable du dommage causé par son enfant mineur, mais cette responsabilité a lieu seulement lorsqu'il ne peut prouver qu'il n'a pu empêcher le fait qui a causé le dommage.

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Dans l'espèce, le fait qui a causé le dommage s'est produit hors la présence et loin de la surveillance des parents du mineur Lucien Berthiaume, mais les faits allégués en défense et établis en preuve ne vont pas à établir que le fait préjudiciable ne se rattache à aucune négligence ou faute quelconque imputable au défendeur.

La véritable cause à laquelle il y a lieu d'attribuer le fatal accident en question, est le défaut de surveillance de la part du défendeur qui devait, comme il pouvait, empêcher son fils de s'éloigner de la maison ; en effet, à l'âge où se trouvait l'auteur de cet accident, le 6 juillet 1903, cet enfant de neuf ans près ne devait pas être abandonné à lui-même, sans qu'aucune précaution eût été prise pour prévenir l'imprudence naturelle à cet âge ; dès lors, il a pu se livrer impunément aux actes dangereux qui ont amené sur Alfred Deschamps la perte de l'œil ; par conséquent, il y a eu lieu de déclarer le défendeur civilement responsable du fait de son enfant mineur, par l'article 1054 C. Civ.

L'action de Lucien Berthiaume a eu de déplorables conséquences. On doit, dans l'appréciation des dommages, tenir compte de la liberté que les parties en cette cause laissent à leurs enfants respectifs et aussi de cette circonstance que le fait est imputable à un enfant de près de neuf ans, qui n'en voulait pas à la victime de son imprudence, et que la gravité de son action ressort du résultat bien plus que du fait lui-même.

Ce dommage doit être apprécié par le tribunal en considération des dépenses qu'il a occasionnées au demandeur personnellement, des pertes auxquelles est exposée la victime et des souffrances mêmes qu'elle a subies ; et la preuve fournit les éléments voulus pour évaluer et fixer la réparation du préjudice total à \$300 ; dont \$75. pour le demandeur personnellement et \$225, pour son fils Alfred, dont il est le tuteur.

Par ces motifs, la cour rejette le plaidoyer du défendeur et le condamne comme civilement responsable du fait de son fils Lucien, à payer au demandeur, ès-nom et qualité, la somme de trois cents piastres, cours actuel, avec intérêt à compter de ce jour et les dépens.

JUGEMENT EN RÉVISION.

TASCHEREAU, J. :—

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Cette cause a été inscrite par le défendeur pour révision du jugement qui l'a condamné à payer les dommages causés par son fils mineur au fils mineur du demandeur, en raison de la responsabilité des parents pour les actes délictueux et quasi-délictueux de leurs enfants mineurs, prévue à l'art. 1054 C. C.

La faute et l'imprudence du jeune Lucien Berthiaume ont été la cause directe de l'accident arrivé à l'enfant mineur du demandeur et étant capable, à l'âge de neuf ans, de discerner le bien du mal, ce jeune Berthiaume pourrait être tenu responsable du dommage et recherché en justice après avoir été pourvu d'un tuteur (Art. 1054 C. C.).

Pour ce qui regarde le défendeur, le père, sa responsabilité n'a lieu qu'à son défaut de prouver qu'il n'a pu empêcher le fait délictueux de son enfant (Art. 1054 C. C.).

Les deux familles intéressées dans ce litige vivent en voisinage immédiat dans un faubourg populeux de la cité de Montréal. Leurs enfants avaient l'habitude de jouer ensemble, soit dans les cours de leurs logements respectifs, soit dans la rue. A moins de les tenir enfermés, ce qui est impraticable, surtout dans la belle saison, il était impossible d'exercer sur eux une surveillance de tous les instants et de les empêcher, à aucun moment donné, de se livrer à quelque jeu dangereux. Dans la circonstance en question, ces enfants avaient passé une partie de l'après-midi à jouer dans la cour même du demandeur, sous la surveillance de l'épouse de ce dernier. Plus tard, Lucien Berthiaume et deux autres enfants nommés Filiatrault et Despocas, se sont trouvés ensemble dans la rue, en face de la maison du demandeur. Avant que la femme de celui-ci pût intervenir et empêcher la chose, Lucien Berthiaume se mit à prendre des pierres cachées dans sa casquette, et à les lancer sur son camarade Despocas. La seconde pierre, au lieu de frapper ce dernier, atteignit le jeune Deschamps et lui infligea à l'œil droit la lésion qui a déterminé la perte de cet organe.

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Aucune intention malicieuse n'animait l'auteur de cette imprudence et, comme le dit le premier juge, la gravité de son action ressort du résultat bien plus que du fait lui-même.

Il est établi par l'enquête que le défendeur qui ne gagne qu'un salaire de douze dollars par semaine comme sergent de ville, a élevé douze enfants, dont neuf sont encore vivants et demeurent avec lui ; qu'il les fait tous instruire convenablement ; que lui-même et son épouse ont toujours exercé sur ses enfants la surveillance ordinaire de parents respectables ; que leur fils Lucien, bien que d'une nature turbulente et dissipée, n'a pas de mauvais instincts ; qu'au temps de l'accident, le défendeur et son épouse étaient bien fondés à croire que les enfants des deux familles, jouant dans la rue ou dans la cour, sous l'œil de la femme du demandeur, ne couraient aucun danger et étaient suffisamment surveillés ; que l'épouse du défendeur relevait alors de ses couches ; que le défendeur lui-même était obligé de voir au ménage de la maison et d'avoir soin de sa femme convalescente et qu'ainsi, tous incapables pour le moment d'avoir l'œil aux enfants, avaient raison de les croire en sûreté sous la surveillance de leur voisine.

Il n'y a donc pas lieu, dans l'espèce, de tenir responsable le défendeur qui n'a pu empêcher le fait délictueux reproché à son enfant et il y a erreur dans le jugement qui a maintenu l'action.

Pour ces motifs, nous l'infirmos et nous renvoyons l'action avec dépens.

SIR M. M. TAIT, CH. J. :—

At Montreal, on the 6th July, 1903, the minor son of the defendant, Lucien, nine years of age, grievously wounded Alfred, the minor son of the plaintiff, aged six years, by throwing a stone at his head and hitting him in the right eye, with the result that the eye was lost and the other one seriously affected. Hence a suit against the defendant personally by the father of the injured boy for \$990 damages. The trial judge, Tellier, J., gave judgment in favour of the plaintiff for \$300

and the costs. We find that the fault and imprudence of the minor son of the defendant was the direct and immediate cause of the accident which happened to the plaintiff's son, and Lucien Berthiaume, being nine years of age and well able to distinguish between right and wrong, he can be held, if he is represented by a tutor, responsible for damages caused by him if sued for that purpose (1053 C. C.). Inasmuch as the responsibility of the defendant is involved, Lucien Berthiaume's father, he can be held responsible in damages only when he fails to prove that he could have prevented the accident caused by his son (C. C. 1054). It is proved in this case that both families herein are near neighbors in a densely populated part of Montreal and the children of both parties had been accustomed to play together in the yards as in the street. Without keeping them in the house, which would be a great hardship—particularly in the hot weather—it would be impossible to superintend the children during every instant of the day and to prevent them, at a given time, from resorting to some dangerous game. In the afternoon in question the little boys had been playing together in the plaintiff's yard, under the care of the plaintiff's wife, and two other little boys were playing immediately outside on the street with Lucien Berthiaume. The plaintiff's minor son was at the door of his father's house, looking out on the street, with his mother, when one of the stones which Lucien Berthiaume had in his cap and which he was throwing at one of the other little boys with whom he was playing in the street, missed the boy it was intended for and struck the plaintiff's son and inflicted the injury to his eye. There was no bad feeling between the two boys, and, as said by the Judge of first instance, the seriousness of the little boy's action arises more from the result thereof than from the deed itself. It is established in the evidence given that the defendant earns but twelve dollars per week ; that he has to the fullest extent of his power and that of his wife educated and brought up his twelve children as well as it could possibly be done by any one under the circumstances; that Lucien, while somewhat wild by nature, is a boy of

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good instincts ; that at the time of the accident, while the children of both families were playing together in the same street as in the same yard, under the eye of plaintiff's wife, the defendant and his wife were fully justified to believe that no danger could result and that their child was sufficiently watched ; the defendant's wife had recently left her bed after a serious illness and, at the time, the defendant himself was running the household and caring for his sick wife, and for these reasons, both husband and wife reasonably believed that their boy was sufficiently watched by the plaintiff's wife. We are of the opinion that, in the present case and under the circumstances we have just related, that the defendant is not responsible and that he could not have prevented his son's act. We are, accordingly, unanimously of the opinion that the judgment in first instance is in error and it is reversed and the plaintiff's action is dismissed with costs.

O. Mousseau, pour le demandeur.

Beaudin, Lorranger & Saint Germain, pour le défendeur.

COUR SUPÉRIEURE

ST JOSEPH, 23 octobre 1906.

Présent :— H. G. CARROLL, J.

BREAKEY v. BILODEAU.

Procédure—Concession de permis de coupe de bois—Possession du concessionnaire—Action en complainte.

*Jugé :—*Les concessionnaires de permis de coupe de bois sur les terres du domaine public ont une possession des étendues (*limits*) comprises dans ces permis, qui donne ouverture en leur faveur au recours de l'action en complainte contre ceux qui les troublent. Cf., en sens contraire, *Price v. Girard*, 28 C. S. 244.

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Je suis appelé à décider une question rendue épineuse par un jugement récent de la Cour de Révision à Québec, dans la cause de *Price vs Girard* (1)

M. le juge en chef actuel, dont l'opinion a pour tous une si grande valeur, a décidé que le porteur de licence d'une coupe de bois n'a pas droit aux conclusions d'une action possessoire.

Voici comment il s'exprime : "L'article 1064 du code de procédure ne donne cette action qu'à celui qui possède un immeuble ou un droit réel, à titre autre que celui de fermier ou de précaire. Le demandeur possédait-il ces deux lots comme propriétaire ou comme y ayant un droit réel, autre que celui de propriété ?"

"Certainement non, il ne le détenait même pas comme fermier, car tout le droit qu'il prétendait y avoir était celui d'y couper le bois. Sans doute, le permis que le gouvernement lui avait donné de couper du bois sur ces lots lui donnait le droit d'en prendre possession et d'en jouir (S. R. Q. art. 1311) mais cela veut seulement dire qu'il avait le droit d'y faire tout ce qui était nécessaire pour faire du bois. On ne prétendra pas, par exemple, qu'il avait le droit d'y exploiter des mines ou des carrières s'il s'y en était rencontré. Il ne lui permettait donc pas de le posséder comme propriétaire." "Et le juge Andrews, dans la même cause, p. 246 dit: "I do not think however that the possessory conclusions of the action can be sustained. There is nothing in the statute relating to timber licenses giving the licensee such an action though it is given to the settler holding a location ticket, and I do not think that our code of procedure confers it on one who, like the plaintiff, has a mere lease of a right to cut. The article 1064 restricts the possessory action to the possessor of any immovable or real right, which such a lessee cannot be held to be", et la Cour de Révision a modifié le jugement du juge Routhier, qui avait accordé les conclusions possessoires.

(1) 28 C. S. 244.

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Toute la question est de savoir si le porteur d'une licence de coupe de bois a un droit immobilier ou réel. S'il n'a pas ce droit, les conclusions possessoires ne peuvent être maintenues; s'il a ce droit, elles peuvent l'être.

Les auteurs français ne traitent pas directement de la question qui nous occupe et pour une excellente raison, c'est que nous avons une législation spéciale au sujet de ces licences, et quant aux coupes de bois en France, elles sont soumises à des lois particulières d'administration. Mais les auteurs posent certains principes d'où nous pouvons tirer des conséquences pour la décision du cas actuel.

Il ne peut y avoir de discussion sur ceci : que l'usufruitier, l'usager, celui qui a un droit d'habitation, l'emphytéote, celui qui a un bail à domaine congéable et le superficiaire, ont tous l'action possessoire.

Sans doute ces démembrements du droit de propriété ont des aspects particuliers, mais je trouve qu'il y a de l'analogie entre le droit du licencié, le droit du superficiaire et le droit de celui qui a un bail à domaine congéable. Quant à ce dernier bail, il est à terme, le propriétaire du domaine a le droit de congédier le colon en lui payant les édifices et superficies qui existeront ; mais à tout événement, c'est un contrat pour une époque déterminée et résoluble au gré du propriétaire. Il en est de même du licencié, le commissaire des terres peut mettre fin à la licence, le contrat est résoluble, si le licencié ne se conforme pas à la loi ou aux règlements ; s'il s'y conforme, la licence doit être renouvelée chaque année.

Il est vrai que par un règlement du 1er juin 1901, il est pourvu qu'au cas de destruction partielle ou totale de la valeur d'une limite, soit par incendie, par l'extension de la colonisation, ou pour d'autres causes, le commissaire a le pouvoir discrétionnaire d'annuler la licence en tout ou en partie.

Que veut dire l'expression "pour toutes autres causes ?" Est-ce un pouvoir arbitraire donné au commissaire d'annuler la licence ? Evidemment non ; ces expressions "pour toutes autres causes" pourraient être plus claires, mais suivant immédiatement une cause valable d'annulation qui est spéci-

fiée, l'on doit dire que ces mots signifient "toutes autres causes valables" de cancellation.

Curasson (Actions Possessoires, No 50, p. 248), dit : "Si de droit commun, les arbres sont censés appartenir au propriétaire du sol, il existe cependant des terrains formant deux propriétés bien distinctes et dont celle des arbres est souvent la plus importante. C'est ce qui arrive dans la constitution du droit de superficie ; l'un a la propriété du sol, des herbes qui le couvrent, l'autre celle des arbres qui y croissent. Ce partage de la propriété est connu dans plusieurs pays, il est assez fréquent dans les montagnes de la Franche-comté....

"Dans ce cas, le propriétaire du sol n'a les actions possessoires que pour le fonds, pour l'herbe qui y croît. En ce qui concerne les arbres, la voie de complainte appartient au superficiaire, qui peut l'exercer, soit contre les tiers, soit même contre le propriétaire du fonds, s'il est l'auteur du trouble. Mais dans tous les cas où le fonds appartient à l'un et les arbres à l'autre, on doit sentir la nécessité où se trouve le superficiaire de produire un titre à l'appui de sa demande en complainte."

Et à la page 249, No 51, Curasson, parlant du colon et du bail à domaine congéable, dit: "Il a par conséquent les actions possessoires, puisque, malgré le pacte résolutoire, il est propriétaire des superficies tant que le propriétaire du fonds ne les a pas rachetées."

Et Laurent, Vol. 8, p. 498, No 414, dit: "Il y a une grande analogie entre l'usufruit et le droit de superficie.....

"Tous les deux sont un droit réel dans le fonds d'autrui, droit qui leur donne la jouissance des bâtiments qui s'y trouvent ; ce droit s'exerçant dans une chose immobilière, est placé par la loi parmi les immeubles, et peut, par suite, être hypothéqué. L'un et l'autre ont les actions possessoires." Et Laurent ajoute que "ce droit peut être établi par vente et par bail pour un temps limité et moyennant une redevance annuelle. Donc le droit est aussi résoluble."

"Le titre du superficiaire, dit Laurent, p. 505, Vol. 8, est un titre non précaire, en ce sens qu'il a un droit réel dans la

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"chose, droit d'une telle étendue qu'on l'assimile à la propriété."
"té."

Il importe à présent de discuter si le titre du licencié est un titre précaire.

La section 1311 Statuts R. Q. dit : "Le permis doit contenir "une désignation du terrain sur lequel la coupe du bois doit se "faire et est censé conférer pour le temps aux personnes nom- "mées en icelui, *le droit de prendre possession* et de jouir à "l'exclusion de toutes autres personnes du terrain y mention- "né, d'après les règlements et restrictions établis." Cette section est la reproduction de S. R. Q. ch. 23, sect. 2.

Cette section donne donc au licencié le droit de prendre possession et de jouir du terrain mentionné à la licence. Le licencié a donc la possession et la jouissance du terrain avec lequel les arbres vendus sont unis.

Voyons quels droits lui confère la section 1313. "Tel permis est un titre suffisant pour autoriser la personne qui le possède à intenter toute action ou poursuite contre tout "possesseur injuste du terrain désigné dans le permis, ou contre "ceux qui pourraient y commettre des empiètements"

Or, par la section 1311, le licencié est possesseur du terrain ; s'il est possesseur du terrain en vertu de son titre, n'a-t-il pas droit de demander d'être réintégré dans sa possession s'il est dépossédé ? n'a-t-il pas droit de demander que défense soit faite de le troubler, puisque la section 1313 l'autorise à intenter toute action contre un possesseur injuste ou contre celui qui commet des empiètements.

Le titre qu'il possède lui donne un droit réel dans la chose et conséquemment il possède à titre *non précaire*. C'est ce que la Cour d'Appel par le juge Loranger déclarait en 1874, dans la cause de *Watson vs Perkins* (1), où il a été décidé : "That "the sale of Government timber limits is a sale of an immo- "vable".

(1) 18 L. C. J. 261.

A la page 269, le juge Loranger s'exprime ainsi : "La jurisprudence de ce pays, quels que fussent les usages en France, a considéré le droit abstrait de coupe de bois, comme un droit réel, et l'a traité comme une servitude. Mais il en est autrement d'un droit illimité qui s'applique à toute une forêt, qui, perpétuel ou temporaire, embrasse toute la superficie qui s'attache à chaque arbre de grande futaie, comme à chaque taillis qui pénètre même le sol puisqu'il comporte nécessairement un droit de possession d'un droit, qui, comme l'usufruit ou l'usage, asservit tout le domaine à l'utilité de l'acquéreur et comme eux comporte un démembrement de la propriété qui peut même devenir l'objet de la prescription. Evidemment, c'est ici la réalité que le contrat cède et la mobiliser serait choquer tous les principes sur la distinction des biens. Aussi, le statut qui, il est vrai, n'accorde que pour un an la licence que l'administration des forêts publiques renouvelle indéfiniment, en revêtant le concessionnaire du droit de possession de la limite (et j'ajouterai du terrain), de celui de poursuivre pour voie de faits les déprédations, et de revendiquer le bois coupé par des tiers sur le terrain concédé, droits qui ne peuvent appartenir qu'au possesseur civil du fonds a-t-il emphatiquement reconnu à la licence son caractère de réalité."

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Et M. le juge Sanborn ajoute dans la même cause, p. 270 : "It is a sale of a real right and an immovable. Our timber licenses issued by the Crown continue for a term of years and are subject to renewal and to the payment of an annual rent, and the holders have the rights of proprietors as respects trespassers. It is as distinctly an immovable as an emphyteusis."

Il faut remarquer que la Cour de Révision, à Montréal, dans la même cause, avait jugé dans le même sens. Cette jurisprudence a été acceptée par la Cour Supérieure de Joliette, où le juge de Lorimier a décidé, dans la cause de *Migné vs Kelly* (1)

(1) 35 J. P. 144 .

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1o. que le droit accordé par une licence ou permis de coupe de bois sur les terres de la Couronne en vertu des S. R. C. ch. 23. sect. 1 et suiv. aujourd'hui Statuts Refondus de Québec, art. 1300 *et seq.* est un droit immobilier susceptible d'être hypothéqué, sous réserve des clauses résolutives contenues au permis.

Maintenant, quant aux faits ils ne souffrent pas de difficultés. Les demandeurs sont possesseurs de ces limites depuis trente à quarante ans, par permis renouvelé chaque année.

Les défendeurs ont voulu prendre possession de lots dans les limites ; ceci n'est pas contesté.

Je maintiens les conclusions possessoires et condamne le défendeur Bilodeau à dix piastres de dommages.

Pacaud & Morin, pour le demandeur.

Talbot & Godbout, pour le défendeur.

COUR DE RÉVISION

QUÉBEC, 31 octobre 1906.

Présents:—LANGELIER, juge en chef suppléant, LEMIEUX ET
 • SIR C. A. P. PELLETIER, JJ.

LA VILLE DE CHICOUTIMI v. LAVOIE & GUAY, défendeur en garantie.

Procédure—*Action en bornage*—*Allégation d'empiètement*—*et revendication*—*Action en garantie.*

JUGÉ :— L'action en bornage dans laquelle le demandeur se plaint d'un empiètement par le défendeur et demande à être déclaré propriétaire de la partie d'immeuble où il est troublé, revêt le caractère d'une revendication et, dès lors, les recours en garantie que le défendeur peut avoir lui sont ouverts. Cf. *Blackburn v. Blackburn*, 11 Q. L. R. 170.

Le jugement qui suit infirme le jugement de l'honorable juge Larue.

LEMIEUX, J. :—

Il s'agit de la révision d'un jugement qui a renvoyé l'action en garantie.

La question à déterminer est celle de savoir, si un défendeur, poursuivi en bornage, peut appeler en garantie son vendeur.

Deux décisions, l'une de la Cour de Révision, *Blackburn & Blackburn* ⁽¹⁾ et l'autre de la Cour du Banc de la Reine *Duveluy & Vigneau* ⁽²⁾ ont été invoquées par les parties.

Ces décisions, bien que rendues apparemment dans un sens opposé, ne se contredisent pas, car il y avait lieu, dans chacune de ces causes, comme dans le présent litige, de faire une distinction importante.

Si l'action en est une en bornage pure et simple et ne fait que demander la fixation d'une ligne séparative de deux fonds de terre contigus, au moyen de signes extérieurs et apparents, appelés "*Bornes*", si l'action ne consiste qu'à demander le placement de bornes, suivant les titres et la possession respective des parties, ou en reconnaissance de bornes, dans ces cas, l'action en garantie ne compète pas au défendeur contre son vendeur.

La raison est qu'en une telle instance, le défendeur n'est ni évincé, ni menacé de l'être par l'action qui ne lui cause pas un trouble de droit.

Une action de semblable nature ne met pas le défendeur en présence d'un adversaire qui lui oppose un titre supérieur au sien pour s'emparer d'une partie de sa propriété.

La poursuite en bornage, n'a alors en vue que l'exécution, que l'obligation, que la servitude légale du bornage, à laquelle tout voisin est soumis, afin d'assurer au propriétaire le privilège de ne pas rester dans l'indivision.

(1) 11 Q. L. R. 170.

(2) 16 Q. L. R. 251.

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C'est dans ce sens que doit s'interpréter la décision rendue en cette cause de *Daveluy & Vigneau*.

Mais, si l'action en bornage revêt un autre caractère, si elle participe du pétitoire ou de la revendication, si elle affirme un droit de propriété dans tel immeuble jusque-là occupé et possédé par le défendeur, si elle soutient que ce dernier occupe illégalement un terrain et qu'il trouble le demandeur dans la jouissance et possession de ce terrain qu'il réclame ; si, en outre, le défendeur oppose aux prétentions du demandeur un titre contraire lui dérivant d'un tiers, alors l'action en garantie contre le tiers appartient au défendeur ; pour cette raison qu'il est menacé d'éviction, et que cette menace, faite au moyen de procédures judiciaires, constitue un trouble de droit.

Ainsi l'a décidé la Cour de Révision dans cette cause de *Blackburn & Blackburn*.

Faisons l'application de la doctrine au cas soumis.

La ville de Chicoutimi allègue, dans son action en bornage, qu'elle est propriétaire d'une rue No 10, en vertu d'une réserve faite lors de l'arpentage primitif de la ville projetée, et aussi, en vertu de la loi ; que Lavoie est propriétaire et en possession d'un terrain contigu à la rue No 10, compris dans le lot cadastral No 318, et, cela en vertu d'un acte de vente, à lui consenti par Guay, le défendeur en garantie, le 3 avril, 1897, et enfin, que Lavoie trouble la ville dans la possession de la rue en empiétant sur cette rue, causant par là à la ville de Chicoutimi des dommages considérables.

Lavoie a appelé en garantie J. D. Guay, son vendeur, dans son action, il dit entr' autres choses : que Guay, par l'acte du 3 avril 1897 et ratifié le 29 avril 1899, lui a vendu le lot 318 de superficie inconnue et mesurant quatre-vingts pieds de largeur de l'est à l'ouest ; qu'il est troublé dans sa possession par l'action en bornage de la ville de Chicoutimi, laquelle prétend lui enlever une grande partie du lot 318 par l'établissement ou l'ouverture de la rue No 10.

Et il conclut, entr'autres choses, à ce que Guay intervienne dans l'action en bornage pour prendre son fait et cause

pour le garantir et indemniser de toute condamnation qui pourrait être portée contre lui dans l'action en bornage.

Guay, par son plaidoyer, reconnaît le titre qu'il a consenti à Lavoie ; mais il soutient qu'il n'est pas tenu de le garantir contre l'action en bornage, qui n'est, d'après lui, qu'une demande de l'exécution d'une servitude légale de bornage.

Toute la preuve consiste dans une admission de faits des parties dans laquelle Guay admet—ce sont aussi les prétentions de Lavoie—que d'après le plan du cadastre de la ville de Chicoutimi, la rue No 10 enlèvera une grande partie du terrain vendu par Guay à Lavoie, partie de terrain que le bornage seul déterminera d'une manière exacte.

Comme on le voit, il s'agit d'un débat engagé entre un vendeur refusant la garantie légale à un acheteur qui prétend être inquiété par un tiers dans la chose vendue, par une procédure judiciaire et pour causes antérieures à la vente.

La garantie, d'après la loi, a pour objet, la possession paisible de la chose, et oblige le vendeur à prendre fait et cause pour l'acheteur, c'est-à-dire le défendre, contre le tiers qui le trouble dans l'exercice de ce droit, ou qui agit en revendication contre l'acheteur en vertu d'une cause antérieure à la vente.

Dans tous ces cas, et lors de toutes procédures judiciaires comportant une menace capable d'inspirer une juste crainte d'éviction, l'acheteur a droit d'appeler son vendeur en garantie.

Pour agir, il suffit que l'acheteur ait un trouble de droit. Nous disons que le vendeur doit à l'acheteur la garantie de la paisible possession de la chose vendue.

Or, cette possession n'est plus paisible dès que l'action dirigée contre l'acheteur menace de l'évincer de tout ou de partie de la chose vendue. Et quel que soit le trouble et d'où qu'il vienne, que ce trouble soit causé par une action en complainte ou en réintégrande, pétitoire ou en revendication, ou en bornage, l'acheteur troublé a droit d'exiger que le vendeur le fasse cesser.

C'est l'avis de Laurent et c'est aussi l'idée consacrée par

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la doctrine, "que l'acheteur peut agir contre le vendeur dès qu'il est troublé par *une action en revendication ou une autre action qui compromet tout ou partie de ses droits.*"

24, Laurent, page 232-33. Troplong.—Marcadé.

Ce serait une singulière condition faite à l'acheteur, cité en justice par une action en bornage et dans laquelle le demandeur lui dirait : "Nos propriétés sont contiguës, mais la moitié de l'immeuble que vous occupez ne vous appartient pas, malgré vos prétentions, elles sont à moi en vertu d'un titre préféralle au vôtre; je demande le bornage de nos propriétés, mais un bornage qui devra se faire de manière à me donner une partie de cette propriété que vous détenez,"—sans que l'acheteur pût se retourner vers son vendeur pour lui demander la protection lui résultant de la garantie.

S'il en était ainsi, les droits de l'acheteur découlant de cette garantie deviendraient illusoires dans bien des cas.

Nous croyons donc, que chaque fois que l'action en bornage, ou la contestation d'icelle, révèle un danger pour les droits d'un acheteur, et le met en péril d'éviction, ce dernier a son recours en garantie contre son vendeur.

Or, la ville de Chicoutimi prétend, par son action en bornage, que la rue No 10 lui appartenant, doit absorber ou comprendre une partie du lot 318 acquise et possédée par Lavoie en vertu du titre que Guay lui a souscrit, et elle ajoute que Lavoie empiétant ainsi sur cette rue, lui cause des dommages considérables.

Il est en outre démontré par le plan du cadastre de la ville de Chicoutimi, "plan dont l'exactitude est admise par Guay," que la rue No 10, si elle est ouverte et bornée telle que le prétend la ville, enlèvera à Lavoie la plus grande partie du terrain acquis de Guay. Ce plan officiel sera un élément puissant de preuve en faveur de la ville et fait présumer qu'elle s'appuiera sur ce document pour faire maintenir ses prétentions.

Si Lavoie n'a pas le droit d'appeler Guay en garantie, et de le mettre en cause, s'il est privé de l'appui de son vendeur et des moyens que ce dernier peut lui fournir pour écarter le

bornage tel que demandé par la ville, il s'en suivra que Lavoie sera, ou pourra être évincé d'une grande partie de la propriété achetée, pour la seule raison qu'il n'aurait pas pu profiter de la garantie contre l'éviction accordée à tout acheteur.

Il n'en peut être ainsi, et nous adoptons les vues de Lavoie, à l'effet qu'il a droit d'appeler Guay en garantie pour qu'il prenne son fait et cause et qu'il l'acquitte, et le garantisse de toute condamnation qui pourrait être portée contre lui dans l'action en bornage.

La cour de première instance en a jugé autrement. Nous croyons que ce jugement est erroné et qu'il doit être révisé et infirmé avec dépens des deux cours.

Elzéar Lévesque, procureur de la demanderesse.

Alain & Lapointe, procureurs du défendeur et demandeur en garantie.

Belleau, Belleau & Belleau, procureurs du défendeur en garantie.

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ARTHABASKA, 15 octobre 1906.

Présent :—MALOUIN, J.

MANSEAU v. MERCURE.

Droit municipal—Election des conseillers d'une ville—Bulletin de présentation des candidats—Attestation des signatures—Ajournement par le président—Refus de proclamer—Mandamus.

Jugé :—Les signatures sur le bulletin de nomination d'un candidat à une élection de conseillers pour une ville, doivent être certifiées ou attestées par *affidavit*, et le président de l'élection peut ajourner la proclamation du candidat élu pour lui permettre d'accomplir cette formalité. Par suite, cet ajournement ne saurait être pris pour un refus de proclamer qui donne ouverture au recours du *mandamus* contre le président.

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MALOUIN, J. :—

Il s'agit d'une requête demandant qu'il émane un bref de *mandamus* enjoignant à l'intimé de proclamer le requérant élu à la charge de conseiller pour le quartier nord de Drummondville.

Le huit janvier 1906, il y a eu élection municipale pour élire un conseiller pour le quartier nord de la ville de Drummondville.

L'intimé, Alexandre Mercure, était le président de l'élection. L'assemblée s'est ouverte à dix heures du matin à l'hôtel-de-ville ; à l'ouverture, le requérant Manseau a remis au président, son bulletin de mise en nomination. Il contenait douze signatures. Peu de temps après, il y a eu deux protêts de mis entre les mains du président de l'élection par certains contribuables de la ville, mais qui n'étaient pas électeurs dans le quartier nord.

L'un de ces protêts était signé par six électeurs protestant contre la validité de la mise en nomination du requérant, parce que les personnes qui paraissaient l'avoir signé n'étaient pas présentes et le protêt ajoutait : "si le président en vient à la conclusion que la présence des électeurs n'est pas nécessaire, nous demandons la preuve de l'identité des signatures."

L'autre protêt signé par une seule personne attirait l'attention du président sur le fait qu'il y avait, sur le bulletin, des signatures de personnes qui n'avaient pas le droit de vote.

Après la réception de ces protêts, le président de l'élection demanda au requérant de reconnaître ou d'identifier les signatures apposées à son bulletin de présentation. Le requérant en identifia quatre et se déclara incapable d'identifier les autres. Subséquentement à cela, le requérant fit signer un bulletin de présentation additionnel par six personnes et attesté par E. A. Piché, comme témoin. M. Napoléon Garceau produisit alors un nouveau protêt disant que le second bulletin du requérant n'était pas signé par sept électeurs du quartier nord. En effet, il est admis que les signatures à ce bulletin n'étaient pas électeurs pour le quartier nord.

Après l'expiration de l'heure pour la remise des bulletins de présentation entre les mains du président de l'élection, comme il n'y avait pas d'autres candidats sur les rangs, l'intimé déclara au requérant qu'il lui donnait jusqu'au 15 janvier alors courant pour identifier les signatures apposées à son bulletin, et, dans l'après-midi du 8 janvier, le requérant se rendit chez l'intimé de nouveau pour se faire répéter par lui ce qu'il y avait à faire pour identifier les signatures. L'intimé lui dit: "obtenez l'affidavit des personnes dont les noms apparaissent sur votre bulletin, déclarant qu'elles ont signé votre bulletin de présentation." Le requérant partit et revint le 15 janvier au matin, avec cinq déclarations solennelles de la part de cinq électeurs du quartier nord, demeurant à Montréal, qui avaient signé le bulletin de présentation du requérant et les remit à l'intimé. Sur réception de ces déclarations, l'intimé déclara élu le requérant et, le 17 janvier, lui remit un avis de son élection et fit son rapport au bureau du conseil.

Le 12 janvier, le requérant faisait émaner le présent bref de *mandamus*; le 13 janvier, il était signifié à l'intimé avec la requête annexée et le 19 janvier, il était rapporté en cour.

Il ne s'agit donc plus que d'une question de frais, puisque lors du rapport du bref de *mandamus* et de la requête en cour, le requérant était proclamé élu et en avait reçu avis.

La ville de Drummondville existe en vertu d'une charte spéciale et est régie par l'acte des corporations de ville pour ce qui n'est pas prévu dans sa charte.

L'article 4237 S. R. de Québec dit: "Après avoir ouvert l'assemblée, le président doit mettre en nomination toutes les personnes présentées par écrit par au moins sept électeurs municipaux." La version anglaise se lit comme suit:

"After having opened the meeting, the presiding officer shall place in nomination all persons whose names have been handed in, in writing, by at least seven municipal electors."

Comme on le voit par le texte même de la loi, ce sont les électeurs qui présentent le candidat au président de l'élection, le texte de la version anglaise semblerait indiquer qu'ils doi-

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vent être présents puisqu'il dit : "handed in, in writing, by at least seven municipal electors."

A tout événement, je suis d'opinion que le président d'élection a le droit de demander d'authentifier les signatures qui se trouvent apposées à un bulletin de présentation. En agissant ainsi, il ne fait que son devoir. En effet, il est là pour remplir un rôle intelligent et il doit voir à ce que les procédés de l'élection se fassent régulièrement. Je suis d'opinion que l'intimé avait le droit d'exiger que le requérant fasse reconnaître et authentifier les signatures qu'il y avait sur son bulletin de présentation.

Je lis ce qui suit dans *The American and English Encyclopedia of Law*, Vol. 10, p. 637: "It is usually necessary to the validity of an elector's certificate of nomination that it be signed in person by those whose names appear thereon and that they shall duly acknowledge its execution, or that an affidavit as to the signatures and the qualifications of the voters shall accompany the certificate." Et en marge, on lit: "must be acknowledged." Names signed to a certificate of nomination by electors cannot be counted where there is no acknowledgement of execution of the instrument by such electors. *State v. State & Lesueur* 136, No 842."

Je crois que cette théorie est la seule raisonnable.

La loi exige qu'un bulletin de présentation soit signé par un certain nombre d'électeurs pour qu'une personne soit mise en nomination, ceci est fait dans le but d'éviter des contestations vexatoires; or, pour que le but de la loi soit atteint, il faut que le président de l'élection vérifie et constate que les signataires à un bulletin de présentation sont électeurs et qu'il exige que les signatures soient authentiquées.

Dans le présent cas, le président de l'élection avait d'autant plus de raison d'insister que le candidat lui-même ne pouvait authentifier les signatures.

Mais il y a une autre raison qui me paraît péremptoire. L'intimé n'a pas refusé de proclamer le requérant élu, il a simplement ajourné sa décision au 15 janvier afin de permettre au requérant de faire reconnaître les signatures en question;

et le requérant s'est rendu à sa demande. Partant il n'y a pas eu refus, et, s'il n'y a pas eu refus, il n'y avait pas lieu d'émettre un bref de *mandamus*.

On m'a cité une décision de *Langelier vs Laroche* ⁽¹⁾ qui me paraît au point.

En conséquence, je casse le bref de *mandamus* et je renvoie la requête avec dépens.

P. H. Côté, procureur du requérant.

Perrault & Perrault, procureurs de l'intimé et de la mise-en-cause.

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MONTREAL, 20 septembre 1906.

Présent :—MATHIEU, J.

BELL TELEPHONE CO. v. CITÉ DE MONTRÉAL

Interprétation des lois—Règlement municipal—Actes ultra vires—Pouvoir d'une municipalité d'imposer un droit par règlement—Mode d'imposition—Prescription des demandes en nullité des règlements—Nullité relative et nullité absolue.

Juré :—1o. Un règlement municipal qui assujettit la possession et l'usage d'une machine automatique (*slot machine*) à l'obtention d'une licence moyennant un droit en argent, ne peut être valablement fait en vertu d'une loi qui donne à la municipalité le pouvoir de soumettre à cette obligation l'exercice d'un métier, industrie ou genre d'affaires. Ce règlement est partant *ultra vires* et nul.

(1) 3 Q. L. R. 239.

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20. Est nul un règlement municipal qui impose un droit sans tenir compte du mode d'imposition prévu dans la loi en vertu de laquelle il est passé.

30. La prescription de trois mois des demandes d'annulation des règlements prévue à l'art. 304 de la charte de la cité de Montréal ne s'applique qu'aux cas de nullité relative et non aux cas de nullité absolue où l'on peut dire d'un règlement qu'il est inexistant.

MATHIEU, J. :—

L'action est en nullité de la section 11 d'un règlement de la cité défenderesse, adopté le 27 avril et promulgué le 1er mai, 1905 sous le numéro 329 et intitulé "Règlement amendant les règlements Nos 236 et 313 concernant les contributions foncières, les taxes et les permis (licences)."

La section attaquée est en ces termes :

Section 11. "Nulle personne, société de personnes, compagnie ou corporation n'aura sous son contrôle ou en sa possession d'appareils automatiques (*slot machines*) dans lesquels il est permis au public de déposer de l'argent, sans avoir au préalable obtenu un permis (licence) de la cité, et sans avoir payé au trésorier de la cité les sommes suivantes :

"Pour le premier appareil, dans chaque établissement, \$5.00; pour chaque autre appareil, 50cts."

La défenderesse, dans son plaidoyer, invoque le par. 69 de la section 300 de la charte de Montréal telle que modifiée par 3 Ed. VII, cap. LXII, sect. 22, qui forme partie d'une série de dispositions pour définir les cas dans lesquels les règlements peuvent être faits, et se lit comme suit :

"Pour exiger le paiement d'une licence pour l'exercice de métiers, d'industries et de tous genres d'affaires dont le paiement ne peut être exigé en vertu d'une autre disposition de la présente loi, et pour diviser ces métiers, industries et genres d'affaires aux fins de déterminer le prix de la licence en classes ou catégories différentes, selon le montant de la valeur locative du local où ces métiers, industries et genres d'affaires sont exercés."

Subsidiairement la défenderesse oppose à la demande le

laps de temps écoulé entre la promulgation du règlement, le 1^{er} mai, 1905 et l'institution de l'action le 10 octobre suivant, au-delà de cinq mois, et l'art. 304 de la charte où on lit que "le droit de demander l'annulation d'un règlement est " prescrit par trois mois à partir de sa mise en vigueur."

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Sur le premier point je n'ai aucune hésitation à dire que le fait " d'avoir sous son contrôle ou en sa possession des appareils automatiques (*slot machines*) etc," tel que porté au règlement, ne saurait constituer "l'exercice d'un métier ou " d'une industrie ou d'un genre d'affaires," que la cité aurait le pouvoir de viser dans un règlement.

La défense tirée du par. 69 de la sect. 300 est donc sans fondement et la charte ne contenant aucune autre disposition en vertu de laquelle le règlement ait pu être passé, ce dernier doit être déclaré *ultra vires* et nul. Du reste, quand même le pouvoir de soumettre la possession et l'usage de ces *slot-machines* à l'obtention d'un permis ou licence de la cité moyennant un droit en argent, pourrait se déduire du paragraphe précité, encore faudrait-il que le règlement y fût conforme, en fixant ce droit "selon le montant de la valeur locative du local" où ce genre d'affaires est exercé. Le règlement dont il s'agit ne tient aucun compte de cette exigence du par. 69, sect. 300 et pour ce motif seul est frappé de nullité.

Quant à la prescription de l'art. 304, elle ne s'applique qu'aux règlements annulables, c'est-à-dire, à ceux qui sont entachés d'une nullité relative comme le défaut d'observation des formalités, etc, elle ne s'applique pas aux cas de nullité absolue où l'on peut dire du règlement attaqué qu'il est in-existent.

Pour ces motifs, l'action de la demanderesse est maintenue et l'art. 11 du règlement 329 est déclaré nul avec dépens.

Lasleur, MacDougall & MacFarlane, pour la demanderesse.
Ethier & Archambault, pour la défenderesse.

SUPERIOR COURT.

MONTREAL, May 5th 1906.

Present :—SAINT-PIERRE, J.BEAUDETTE v. THE PROVIDENT SAVINGS LIFE
ASSURANCE SOCIETY OF NEW YORK.

Life insurance—Construction of policy—Surrender of policy—Lapse of insurance—Benefit covenanted on condition of application within fixed delay—General application for payment.

HELD :—10. When a policy of life insurance provides for a benefit to the insured or his representatives upon *surrender* of the policy, such a surrender means a giving up of the policy with an express or implied consent that it be cancelled. The deposit of the policy in the hands of the insurer for the purposes of a loan will not avail as a surrender under the covenant.

20. When it is provided in a policy that after the insurance has been maintained for two years, if it lapses by non payment of the premium and application is made within six months thereafter, a benefit will still accrue, at the death of the insured, to his representatives, and the insured dies and his representatives apply for payment of the insurance within six months of the lapse thereof, such an application is sufficient to entitle them to the benefit of the proviso, though not made specifically therefor.

SAINT-PIERRE, J. :—

The decision of this case rests upon the interpretation to be put upon a contract of life insurance.

The facts are as follows :—On the 23rd September, 1899, the company defendant issued a policy of assurance upon the life of the late Clovis Leduc, in his life time of St Henri, now St Henri's Ward, in the City of Montreal, in favor of the plaintiff, and his wife, for \$1,000.

The policy was issued for one year and the premium of assurance was \$39.45.

Availing themselves of a disposition to that effect to be found in the policy of assurance the late Clovis Leduc and

Angelina B. Leduc, his wife, the present plaintiff, obtained from the company defendant the loan of a sum of money amounting to \$41.56, upon the guarantee of the above mentioned policy bearing interest payable in advance at the rate of five per cent per annum.

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The agreement evidencing this contract of loan is dated the 25th September, 1902.

Clovis Leduc paid his premium of \$89.45 every year up to September 23rd, 1902, and therefore kept the policy alive up to the 23rd September, 1903, but failed to renew his payment on this last mentioned date and, thereby allowed his insurance to lapse.

The receipt for the interest on the loan, which was to be paid in advance is dated September 29th, 1902, and covered the period of twelve months.

Clovis Leduc died on the 15th February, 1904, and the question now laid before me is: How are the respective rights of the parties, to wit, those of the widow beneficiary on the hand, and those of the company of assurance on the other, to be settled?

Clause 2 of the policy under the title "Renewal benefits" and provisions," declares in substance that should the assurance become void by the violation of any of the stipulations or agreements contained in the policy, all the payments of premiums shall be retained by and be the property of the company.

If, however, the policy has been kept in force for the period of two years and is then allowed to lapse for non-payment of the premium, the owner of the policy will not then forfeit all he has paid, as in the event just referred to, but will be entitled on legal surrender of his policy, within thirty days thereafter to one of the two following methods of settlement:—

(1) The owner of the policy may receive a certificate extending this assurance for the face value of his policy for the number of years and months specified in the table to be found at page 3 of the policy subject to the conditions regarding proofs of death specified on said page, provided that if death

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occurs within three years from the date of such certificate and during the term covered by such extended assurance, there will be deducted from the amount payable the amount of the premiums which would have been paid had there been no lapse. (2) The owner may receive a paid up assurance for the amount specified in the said table.

The last part of clause 2 is in the following words :—

"Should no choice be made within said thirty days of the foregoing methods of settlement, the owner of the policy will be entitled to the surrender value in paid up assurance specified in the statute of the state of New York laws of 1892, chapter 690, article 2, section 88."

The section of the New York statute here referred to reads as follows :—" no less than two thirds of the reserve of the policy calculated in accordance with the standard therein prescribed after deducting any indebtedness of the assured on account of any premium and any loan on the policy shall be taken as a single premium of life insurance at the published rates, and shall be applied to purchase upon the same life, at the same age paid-up insurance payable at the same time and under the same conditions, except as to the amount of premium, as the original policy."

The said statute further provides that this right is dependent upon application being made therefor within six months after the lapsing of the policy.

As I said before, Clovis Leduc died on the 15th February 1904 and as more than two years had elapsed since the policy had originally issued, the failure on his part to have paid his renewal premium on the 23rd September 1903, did not debar his widow, the beneficiary under the policy of insurance, from all recourse. It is conceded on both sides that Clovis Leduc who was alive on the 23rd September, was entitled to the one or the other of the two optional recourses given by, section 2, cited above, and to be exercised within a period of thirty days from the date of the lapsing of the policy. It is also conceded that no formal option was made by him, nor

by any one on his behalf, but it is contended that under the peculiar circumstances of the case, an option must be presumed to have been impliedly made by him, and that it was so made in favor of the extension of the policy, as provided for by paragraph 1 of clause 2. Such being the case, says the plaintiff counsel, his widow is now entitled to the benefit of paragraph 1, upon her complying with the requirements therein specified.

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I cannot agree with the plaintiff on this point. We must not lose sight of the fact that in order that Clovis Leduc might avail himself of the benefit of the clause in question, two conditions were essential : (1), he was bound to make a legal surrender of his policy, and (2), he had to give formal expression to the choice he intended to make, and both conditions were to have been fulfilled within thirty days from the 23rd September 1906. The plaintiff's counsel says that the policy had already been in the possession of the company defendant from the date of the loan. True, but this did not constitute a legal surrender of the policy, that is to say the ending or cancelling of it. On the contrary the company had received it as security for the loan of \$41.56 made on the 25th September 1902, and instead of putting an end to the policy both parties had, on the contrary, a manifest interest in its being kept alive. The legal surrender which is here required is not merely for the party interested, the fact of handing over temporarily and for a specific object the insurance policy, which all the while is kept alive, but the consent, coupled with the physical surrendering of it, that it shall cease to exist.

The learned counsel has cited in support of his views the case of *Wurtele vs The Trust & Loan Co.* (1) but I fail to see that this precedent could in any way help him in his pretension.

In that case the Trust and Loan Company had lent money to Wurtele. They had accepted a transfer of the rents of the Seigneurie of Bourg Marie de l'Est to secure payment of the

(1) 13 K. B. 329.

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interest and of the premiums of insurance. They had further undertaken to employ such revenues in payment of interest and premiums. They became for such purpose the mandatary of the party borrowing, and were responsible as any mandatary would be under such circumstances for the due fulfilment of their mandate. If the rents were found to be insufficient, they should have notified the party who had an interest in keeping the policy of insurance alive, and not allow it to lapse to the detriment of the owner of the policy.

Our case bears no traits of resemblance to that just mentioned. The company defendant never assumed the mandatary's obligation to see that the premium was paid when it fell due and far less that of making an option which the insured could only make personally.

The learned counsel has brought a witness, a former agent of the company, in order to prove that Leduc had been led into error with respect to the working of clause No 2, that through the information imparted to him by the agent, he had been led to believe that the policy which he owned would never come to an end, and that the rights which were to accrue to the owner of the policy, in the event of the latter failing to pay his premium, would automatically be preserved without the necessity of any direct intervention on his part. Two answers may be given to this pretension of the plaintiff.

I will say, 1st, that in addition to the positive dispositions of our Code of the subject, Clause VI, in the policy under the caption, "Privileges and Conditions," declares no less positively: "That agents are not authorized to make, alter or discharge these contracts, or to waive any of the provisions thereof, or to extend assurances, or to grant permits, or to bind the society in any way."

The proof has, forsooth, disclosed the fact that there existed such a system as that alluded to by the plaintiff in the course of the taking down of the evidence, but it also showed that the policy now under consideration was not one of those comprised within the system referred to. It would indeed be

difficult to conceive how the option allowed within the period of thirty days after the date of lapsing of the policy, might be automatically exercised. This, however, does not dispose of all of the plaintiff's rights.

Clause 2 positively says that she might still avail herself of a further claim under the statutes of the State of New York, passed in 1892, and I find that, according to the declaration contained in the official letter sent to the plaintiff's counsel the 2nd June, 1904, by Mr Gilbert, the counsel of the company defendant, the plaintiff would have been entitled to a sum of \$39.00 under the statute, "had she filed her claim," says Mr Gilbert, "within the period of six months after the policy " had lapsed."

On this last point I am satisfied that the learned counsel for the society defendant was in error. I find that the evidence shows clearly that the plaintiff did actually put in her claim after the death of her husband and within the required period of six months, referred to by Mr Gilbert. The two letters of Mr Adams, the cashier of the company, dated respectively the 29th February and the 2nd March 1904, leave no room for doubt on the subject. It is true that the usual proof of death required in such cases was not sent in, but in the view of the answer of the company as embodied in Mr Adams' letter of the 2nd March, 1904, such proof was unnecessary. The plaintiff is, therefore, entitled to a judgment for \$39.00, and the society or company defendant is hereby condemned to pay her that sum of money, together with the interest and the costs, including the costs of stenography.

Cooke & Mullin, for the plaintiff.

Greenshields, Greenshields, MacAlister & Languedoc, for the defendant.

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COUR DE RÉVISION.

MONTREAL, 31 mai 1906.

Présents :—PAGNUELO, ROBIDOUX ET CHARBONNEAU, JJ.WILLIAMSON ET AL. & BRADSHAW ET AL. & TURNER,
(intervenant).*Achat de créances—Poursuite pour protéger le défendeur—
Droit des tiers créanciers d'intervenir—Poursuite par
cessionnaire au nom du cédant.*

Jugé:—L'achat à vil prix d'une créance par un parent des débiteurs et une action intentée par lui contre eux sur ce titre, sans volonté d'exécuter le jugement à intervenir, mais dans la vue de protéger les défendeurs, ne sont pas des actes illicites et n'ouvrent pas en faveur des autres créanciers, le recours de l'intervention pour contester la poursuite.

CHARBONNEAU, J., *dissentiente*.

Le jugement, inscrit en révision et qui est infirmé, a été rendu en Cour Supérieure, DOHERTY, J., le 30 juin 1905, dans les termes suivants :

DOHERTY, J. :—

The plaintiffs sue the defendants to recover \$1,200.00, amount of a note made by the defendant Catherine Bradshaw and endorsed by the other defendant George Bradshaw, of date 17th October 1900, at four months.

The intervenant alleging herself to be a creditor of the defendants in a sum of \$800.00, amount of a note made and signed by them, sets forth in her *moyens d'intervention*, that she brought an action thereon, that the defendants appeared and pleaded, merely for delay, an unfounded plea of payment ; that after their plea was filed, the present suit was instituted through the attorneys who represented the defendants in the other suit ; that the note sued on in this case was long since

paid and discharged and the present suit is brought by collusion between the plaintiffs and defendants for the purpose of obtaining a judgment against the defendants and of depriving the intervenant of her recourse; that in any case the plaintiffs never gave any consideration for the notes sued on and are *prête-noms*, for the defendant Catherine Bradshaw, and the intervenant prays for the dismissal of the present action.

The plaintiffs contest the intervention and plead the general issue.

The intervenant has proved the essential allegations of her intervention and more particularly that the plaintiffs were not, at the time of the institution of this action, and are not holders or owners of the note sued on; that they had long previously parted with it and had never got it back, but merely lent their name for this suit at the instance of the defendant, George Bradshaw, and his attorneys; that the same was then and is held (if not by George Bradshaw, the endorser, but, as between the parties to said notes, the principal debtor thereof) by Mary A. Bradshaw, daughter of one and sister of the other defendant, in whose name business is carried on by George Bradshaw, ostensibly as manager for her, and who is the real plaintiff herein; if indeed she be not a mere *prête-nom* for the defendant George Bradshaw.

All the circumstances of what is called the transfer by the plaintiff to Mary A. Bradshaw, acting by George Bradshaw, one of defendants, whereby she purported to acquire, for a sum of \$100.00, the note sued on, together with other claims of the plaintiff against the defendant George Bradshaw, amounting in all to \$1,964.00, as established by their testimony, leave no doubt in the mind of the Court that the transaction if not in reality a payment by George Bradshaw, who, although the endorser, is, as between the parties to the note, the principal debtor, was at all events, by Mary A. Bradshaw intended to operate as a payment in behalf and in discharge of the defendants, maker and endorser of the note sued on. It furthermore appears by the testimony of Mary A. Brad-

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shaw, the real plaintiff herein, that she never intended to acquire by means of this transaction any right enforceable against her mother and brother and that she has not brought the present action with any view, intent or purpose of enforcing in her own interest any such right or claim, but purely and simply for the purpose of using any judgment she may obtain for the purpose of protecting her mother from the claims of other creditors ; and that the present action, in so far as it appears to be brought to enforce any right against the defendants, is a pure simulation.

The payment of \$100. made by Mary A. Bradshaw was in effect a payment and settlement of the note sued on, by and on behalf of the maker and endorser thereof and discharged it. In doing so, Mary A. Bradshaw acquired no right of action exercisable by her in her own name upon the note against the present defendants, whatever right she may have to recover from them the amount paid for their benefit, and she has certainly no greater rights exercisable by an action brought in the name of the plaintiff.

The present suit is manifestly an attempt to revive, in the interests of the defendants and to the detriment of their genuine creditors, an extinguished claim.

The intervention is maintained and the plaintiff's action is dismissed with costs.

JUGEMENT EN RÉVISION.

PAGNUELO, J. :—

Action sur un billet promissoire, signé par la défenderesse Catherine Bradshaw, endossé par George Bradshaw.

L'intervenante est créancière du défendeur, et plaide que le demandeur n'est pas créancier du défendeur ; qu'il a été payé du dit billet par eux, et que la poursuite est collusoire, dans le but de frauder les créanciers véritables lors de la distribution des biens du débiteur commun.

On a contesté le droit d'intervenir au créancier. C'est un

droit incontestable ; il exerce les actions de son débiteur qui néglige ou refuse de se défendre, collusoirement et frauduleusement.

Au fonds, le demandeur a vendu son billet de \$1,200.00 à Mary Ann Bradshaw pour une somme de \$100, et permet à celle-ci de poursuivre le débiteur en son nom. C'est ce qu'elle fait. C'est Mary Ann Bradshaw qui est véritablement la créancière et la demanderesse. L'intervenante va plus loin, et prétend que le billet a été payé des deniers de George Bradshaw, le défendeur, mais la preuve est contre elle. George Bradshaw est l'agent de sa sœur, mais il a acheté le billet pour elle, Mary Ann Bradshaw, sa sœur, qui a payé elle-même les \$100. de ses propres deniers.

Pouvait-elle poursuivre au nom du demandeur ? Cela se fait constamment. Le porteur peut poursuivre ; il devient *procurator in rem suam* lorsqu'il n'est point le créancier du défendeur, et sur ce point, l'intervention doit être rejetée et jugement rendu contre les défendeurs pour le profit de Mary Ann Bradshaw.

On a demandé à Mary Ann Bradshaw : avez-vous l'intention de faire exécuter ce jugement contre votre mère et votre frère ? Elle répond : non, et l'on conclut qu'elle n'est pas créancière du billet, et qu'elle l'a payé pour le profit du faiseur et de l'endosseur. Si elle n'entend pas faire exécuter ce jugement contre sa mère et son frère qui sont insolvable et n'ont aucun bien, elle entend se servir de sa créance à l'encontre des autres créanciers, soit pour concourir à la distribution des biens que les défendeurs pourraient acquérir, soit en prenant part aux résolutions des créanciers. Cette position est tout à fait légale. On peut acheter une créance contre son frère ou son ami, sans avoir l'intention d'exercer les rigueurs de la loi contre eux, même avec l'intention d'empêcher un créancier de tracasser et persécuter un débiteur malheureux, comme on peut acheter son ménage et lui en laisser la jouissance, sans lui faire don de la propriété, dans le but toujours de le protéger. Chacun est libre de protéger son parent à ses dépens, et personne n'a le droit de s'en plaindre.

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Le jugement doit être infirmé, l'intervention rejetée et jugement entré contre les défendeurs, pour le profit de Mary Ann Bradshaw.

Le jugement formel est comme suit :

"Whereas the plaintiff has sold his claim against the defendants to Mary Ann Bradshaw, for a sum of \$100, which sum has been paid out of her own monies, and has agreed and consented to the use of his name for all proceedings relating thereto by said Mary Ann Bradshaw, and the present action is brought by her in the name of the said Williamson, for her own benefit.

Considering that the motive of said Mary Ann Bradshaw in acquiring said note, namely to protect her mother and brother against judicial seizures, is legitimate, lawful, and a creditor is free to enforce or not his claim against his debtor and there is no fraud in buying a claim without the intention of exacting the payment of it, but on the contrary with the intention of protecting a relative or friend against the executory proceedings of the seller or of the other creditors of the debtor.

Considering there is error in the first judgment, doth dismiss said intervention with costs in Review and in first instance and condemn the defendants jointly and severally to pay to the plaintiff, for the use and benefit of said Mary Bradshaw, the sum demanded with interest and costs."

The Honorable Mr Justice Charbonneau, dissenting.

Oughtred, Phelan & Place, pour les demandeurs.

Stephens & Hutchins, pour l'intervenante.

SUPERIOR COURT.

MONTREAL, June 19th 1906.

Present :—DOHERTY, J.

BLANCHARD v. WALKER.

Contract of exchange—Offer in exchange of a thing belonging to another—Suspensive condition—Enforcement of contract—Voluntary rescission—Implied consent resulting from conduct.

HELD :—1o. When one of the parties to an exchange of immovable properties is not the owner of that which he offers to give, the contract is conditional and can only be enforced by him when he has fulfilled the condition, i. e., when he has become the owner of the property.

2o. When one party to an exchange has performed his part of the contract by signing the requisite deed to effect a conveyance of the property given by him, and notifies the other to do the same, as to his part, within a delay after which his failure to do so will be taken as a rescission of the contract, and the latter party first refuses to carry out his undertaking and afterwards pretends his refusal was due to error, and takes steps to carry out the contract, but without putting himself in a position to do so effectually, such conduct will amount to an implied concurrence in the notice of rescission given by the first party.

DOHERTY, J. :—

By a writing *sous seing privé* of the 30th of August 1901, the parties agreed to make an exchange of real estate by which the plaintiff was to give the defendant what he described as his Papineau road property, and the defendant was to transfer to the plaintiff, subdivisions 112 to 135 inclusively and subdivision 364 of lot 17 of the village of Hochelaga.

The property above first described did not belong to the plaintiff at the time of the agreement; one James Price, since deceased, was the owner, and it only passed from his heirs to the plaintiff, by an effective title, on the 19th of November 1903, a circumstance of importance in the decision of this case, as will appear hereafter.

In the month of February 1902, the defendant in pursuance of the agreement, caused a notarial deed of sale to the plaintiff of the Hochelaga property to be prepared and signed it, and

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by a notarial protest of the 4th of March following, called upon the plaintiff to sign it as well, notifying him, at the same time, that his failure to do so, within forty-eight hours, would be taken as a resiliation of the agreement.

The plaintiff thereupon attended at the notary's office and on reading the deed conceived it to be in terms at variance with the agreement, he having forgotten that subdivision 364 of lot 17 was included in it. He, upon that ground, refused to sign the draft, and required the defendant by protest to subscribe another deed, in conformity with his mistaken recollection of the agreement. The defendant declined to act on this request, and, taking the transaction to have fallen through and come to an end, erased his signature on the draft first prepared.

Some short time afterwards, the plaintiff discovered his error and under the belief that the original agreement for the exchange could still be enforced, he caused a second protest to be served on the defendant, on the 22nd of May 1902. In this, he set forth that his refusal to sign the first deed was from error on his part due to the refusal of the defendant and his notary and agent, to give him a proper explanation of its contents ; that he had made and signed another, in identical terms, and he called on the defendant to sign it as well. He added a claim for \$100. for expenses arising out of the error, as having been caused by the defendant and his agent.

The defendant refused to comply with the demand so made and on the 16th of June 1902, the action was brought in which the plaintiff sets up in substance the version of the facts contained in his protest of the 22nd of May preceding, and prays that the defendant be condemned to sign a deed or title in his favour for the subdivisions 112 to 135 inclusive and subdivision 364 of lot 17 of the village of Hochelaga and in default of his doing so within the delay to be fixed by the Court, that the judgment to be rendered, do stand in lieu thereof.

More than seventeen months later, on the 17th of November 1903, the plaintiff, with the consent of the defendant filed

an amended declaration in which he alleged that on the 22nd of May 1902, when he found out his error in refusing to sign the first deed, he not only notified the defendant of his willingness to carry out the exchange, but further fulfilled at the same time his share of it by signing and tendering with his protest a title, in favour of the defendant, to the Papineau road property. He further prays *acte* of his readiness, at all times since, to do all that in law could be required of him to faithfully execute his share of the agreement and sets out the same conclusions as those in the first declaration.

The defendant contested the action, setting up in his plea the circumstances that at the time of the agreement in August 1901, the plaintiff was not the owner of the Papineau road property offered by him in exchange, that he only acquired it after the action has been brought, on the 19th of November 1903, and that long previous thereto, in February 1902, by his refusal to perform his part of the agreement and to accept the conveyance of the Hochelaga property, the bargain had been resiliated.

In support of his demand as set forth in his amended declaration, the plaintiff put before the Court a draft of a deed purporting to be a conveyance of the Papineau road property, dated on the 19th of November 1902, and in which it appears that he only became the owner of it, by purchase from the heirs of James Price, of the same date. It is thus evident that previous to that date, not only had he not carried out his part of the bargain, but that he had never been in a position to do so.

Now, this means that he allowed *twenty-six months* to elapse from the date of the 3rd of August 1901, *twenty-one months* from the *mise en demeure* given him by the defendant in February 1902, *eighteen months* from the discovery of his error in the month of May following, without taking the steps necessary to put himself in that position. It further means that when he brought his suit, he was still *seventeen months* behind reaching it.

Can he under such circumstances compel the defendant to perform the agreement of the 30th of August 1901 ?

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The first question is as to the validity of this agreement itself. Article 1599 C. C. provides that the rules contained in the title of *sale* apply equally to exchange, when not inconsistent with any article specially applicable to it. On referring to the title of *sale*, we find that under article 1487, the sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles.

In the next article, 1488, one of these exceptions reads that the sale is valid if the seller afterwards becomes the owner of the thing. These two articles combined clearly mean that when one sells a thing which does not belong to him, intending to acquire it and thus put himself in a position to discharge his obligations as seller, he makes a conditional sale, the condition being his acquisition of the thing. This is a suspensive condition, and the perfecting of the contract only takes place on its fulfilment. So long as it has not been fulfilled, the contract remains in suspense, inoperative and cannot be enforced by the seller. Applying these rules to the case in hand we find that at the time of the institution of the action, the plaintiff who had undertaken to give in exchange a property which belonged to another had not yet acquired it, in fact he only secured a title to it seventeen months later.

On this ground alone, the plaintiff must fail, but I may add that even if the agreement was held to have been originally valid, I have no hesitation in saying that the conduct of the plaintiff, as stated above amounted to an implied concurrence in the demand and notification of the defendant, in his protest of the 4th of March 1902, that failure to carry out the agreement within forty-eight hours should amount to a resiliation of it. In other words, I am of opinion that the agreement of exchange was set aside by mutual consent of the parties, expressed by the defendant, and implied in the conduct of the plaintiff.

For these reasons the action is dismissed with costs.

Tancrède Pagnuelo, for the plaintiff.

Robillard & Rivet, for the defendant.

COUR DE RÉVISION

QUÉBEC, 31 mai 1906.

Présents :—ROUTHIER, juge en chef, LARUE ET LANGELIER, JJ.

ROUSSEAU v. MARCOTTE

Compte courant—Imputation des paiements—Billet de faveur.

JUGÉ :—Les règles sur l'imputation des paiements tracées par le Code Civil ne sont pas applicables aux comptes courants commerciaux.

Par suite, le tiers qui a souscrit un billet de faveur, dont le montant forme partie d'une dette résultant d'un compte courant, est obligé à la garantie du paiement du solde définitif jusqu'à concurrence du montant du billet, sans qu'il puisse prétendre que les premiers paiements qui ont suivi l'échéance ont éteint cette partie de la dette.

LANGELIER, J. :—

Le demandeur a poursuivi le défendeur devant la Cour Supérieure de Québec en recouvrement de la somme de \$356, balance de deux billets, l'un de \$237.33, et l'autre de \$298, consentis par le défendeur à un nommé Clovis Arcand, et transportés par Arcand au demandeur.

Le défendeur a plaidé que le billet de \$298 était un billet de faveur qu'il avait donné à Arcand, que celui de \$237.33 était aussi un billet de faveur pour \$37.33, que le billet de \$298 avait été payé par Arcand : que le défendeur lui-même avait payé \$200 à compte du billet de \$237.33, et que la balance en avait été payée par Arcand ; que celui-ci étant tombé en faillite, avait fait un concordat avec ses créanciers ; que ceux-ci l'avaient acquitté complètement à condition qu'il payât vingt-cinq cents dans la piastre, et qu'il avait payé ce dividende au demandeur ; qu'enfin Arcand avait donné au demandeur du bois pour plus que les soixante-quinze cents qui restaient dues au demandeur après le paiement du dividende de

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vingt-cinq cents ; que le demandeur avait chargé 8% d'intérêt, alors qu'il n'avait droit qu'à 5%.

En même temps qu'il produisait ce plaidoyer, le défendeur confessait jugement pour \$37.33.

Le demandeur a répondu à ce plaidoyer qu'il avait, en effet, reçu du défendeur \$200 à compte du billet de \$298, et qu'il avait été payé de vingt-cinq cents dans la piastre sur le montant réclainé en cette cause, lors de la faillite de Arcand.

Le tribunal de première instance a condamné le défendeur à payer au demandeur \$272, c'est-à-dire le montant demandé par l'action, moins le dividende de vingt-cinq cents dans la piastre que le demandeur reconnaissait avoir reçu.

Comme on le voit, la contestation entre les parties porte exclusivement sur le billet de \$298, car, bien que le défendeur ait prétendu par son plaidoyer que le demandeur n'avait pas droit à plus de 5% d'intérêt sur le montant que lui devait Arcand, la preuve établit clairement qu'il avait droit à 8% car c'est ce qu'il lui avait toujours fait payer, et Arcand ne s'en était jamais plaint.

Arcand a-t-il payé le billet de \$298, pour la balance duquel le défendeur est condamné ? Car, s'il l'a payé, le défendeur doit profiter du paiement qu'il en a fait, puisqu'il n'était qu'un faiseur par complaisance, et qu'entre lui et Arcand, c'était celui-ci qui était le débiteur principal.

Voici le raisonnement que fait le défendeur pour prétendre que le billet a été payé par Arcand : celui-ci était en compte courant avec le demandeur, qui est banquier et marchand de bois ; or, en examinant le livret de banque d'Arcand, on constate que depuis le moment où il a été débité du montant du billet, qu'il avait fait escompter par le demandeur, il a été mis à son crédit des sommes bien plus que suffisantes pour l'acquitter. Comme aucune imputation de paiement n'a été faite lorsqu'Arcand a fait des paiements, elle a été faite par la loi seule, et la loi l'a faite sur la dette la plus ancienne que devait Arcand. Or, cette dette, c'était le billet en question.

Cet argument serait sans réplique s'il ne s'agissait pas de deux personnes en compte courant, mais l'article 1161 du

Code Civil, sur lequel il est fondé, n'a aucune application au cas actuel. Comme je l'ai déjà dit, le demandeur et Arcand étaient en compte courant. Or, il est de doctrine et de jurisprudence, dit Laurent (Vol. 17, No 629) "que les règles sur l'imputation " ne sont pas applicables au compte courant, notamment la " règle d'après laquelle les paiements s'imputent sur la dette " la plus onéreuse ou la plus ancienne. On ne peut donc " extraire d'un compte courant certaines dettes pour y im- " puter telle remise, à moins que la remise n'ait été affectée " spécialement à une dette déterminée. La raison en est que les " remises faites par compte courant ne sont pas des paiements, " ce sont des prêts ou des avances. Puisque les remises par " compte courant ne sont pas des paiements, il est impossible " d'y appliquer des règles qui ne concernent que le paiement". (Voir aussi Massé, Droit Commercial, Vol. 4, No 1849, et arrêt de rejet de la Cour de Cassation du 17 janvier 1849, Dalloz, 1849, 1, 49. Voir Noblet Compte Courant, No 71).

D'après ces autorités, et elles ne font qu'énoncer une opinion généralement admise, ce n'est qu'après règlement que l'on peut voir laquelle des deux parties en compte courant est créancière et laquelle est débitrice. Or, dans l'espèce actuelle, lorsque le compte entre le demandeur et Arcand a été liquidé il s'est soldé par une balance d'au-delà de \$500 due par Arcand et qu'il doit encore au demandeur.

Le jugement qui nous est déferé doit donc, suivant moi, être confirmé avec dépens.

Tessier & Bigué, procureurs du demandeur.

Choquette, Galipeault & Francœur, conseils.

Drouin, Pelletier, Baillargeon & St Laurent, procureurs du défendeur.

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COURT OF REVIEW.

MONTREAL, April 28th 1906.

Present :—ARCHIBALD, ROBIDOUX AND PARADIS, JJ.

BROWN v. LAUZON.

Contract of sale—Sale of hay in mows and stacks at a fixed price per ton—Weighing of the hay—Sale of specific thing—Revendication—Tender and deposit in Court of price—Condition precedent.

HELD:—10. A sale of all the hay in certain mows or stacks, at a fixed price per ton, is a sale of a specific thing and passes the property of the hay to the purchaser.

20. The buyer at such a sale, however, who revendicates the hay, is bound ; as a condition precedent, to tender the price and, on refusal, to bring it into Court.

The judgment under Review is reported in Vol. 28 S. C. p. 10. It is confirmed as to the *dispositif*, but modified as to the *considérants*.

ARCHIBALD, J. :—

This was an action to revendicate some ninety-five to one hundred tons of hay which the plaintiff alleged had been sold to him by the defendant.

The defendant pleads that there was no complete sale of the property of the hay in question.

The Judge found that the sale was not sufficiently complete to justify the plaintiff in revendicating it, inasmuch as the hay had not been weighed and there remained something to be done to it, namely to take off the spoiled hay of two stacks and also any that might appear in the bottom of the

mows ; and besides, he held that for the purpose of an action in revendication, the plaintiff ought to have offered the price of the hay and brought it into Court, in order to enable the Court in adjudging the case, to give a judgment susceptible of execution.

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The Judge finds, and indeed the proof establishes that the sale of the hay was the sale of the whole of the hay which the defendant had, contained in certain mows and stacks, but that the outside portion of the stacks which became ruined by the weather and small amounts in the bottom of the mows, were to be deducted. The quantity of hay could not be determined, but was estimated at from ninety-five to one hundred tons. The Judge therefore held that the sale was not perfect to the extent of passing the property so as to justify an action in revendication.

I cannot come to that conclusion from the evidence in the case, nor yet from the evidence as found by the Honorable Judge.

It is true that when goods are sold by weight or by measure, the sale is not complete until these goods have been weighed or measured, but when the sale is one of a specific article, although the price has to be determined by weighing or measuring, the rule does not apply. In this case, the weighing and measuring is not for the purpose of setting apart the goods as being the goods sold, but it is simply for the purpose of ascertaining the price to be paid. Here it is true that perhaps not every straw of the hay which was contained in the stacks and mows were to be sold and weighed, but all was to be taken which could be called hay. The sale was of the whole of the hay in these mows, and the purchaser would not have been entitled to reject any hay so long as it was merchantable hay, because it did not come up to the particular standard which appeared on the surface. It was only understood that the hay which was completely destroyed, as was not merchantable hay, nor hay at all in a mercantile sense, namely that which had been exposed to the weather for a

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long period of time and that small portion which through the dampness of the earth might have become destroyed in the bottom of the mow, was not to be weighed or taken as part of the purchase, but I don't think that that fact was sufficient to warrant the conclusion that anything remained to be done to the hay before delivery, which would prevent the property in the hay from passing.

But on the other hand, it seems to me that the plaintiff has not taken his action in a manner in which the Court can give judgment in his favor. It is an elementary principle in jurisprudence that judgments must be susceptible of execution. If the Court here should decide that the plaintiff's action was well taken and declared him to the proprietor of the hay in question, it would still remain optional with the plaintiff to pay or not to pay the price, and all that the Court could do would be to order the defendant to deliver the hay upon payment by the plaintiff of the stipulated price. We are not in a position even to condemn the plaintiff to pay the price, so that the possibility of executing the judgment would depend upon the will of the plaintiff.

In a case of *Foster & Fraser* ⁽¹⁾, a purchaser demanded that it should be declared by the Court that he was the owner of a certain immovable property, and he asked the Court to adjudge that and that the judgment should be equivalent to a title, upon the plaintiff paying the stipulated price. The Court of Appeals held that the judgment could not be rendered on that account, as it would not be susceptible of execution.

It appears to me that this case is on all fours with that one.

The difficulty is raised by the plaintiff that the exact price not being ascertainable from the hay not having been weighed that it was impossible for the plaintiff to determine what sum should be tendered. There are obvious means by which that difficulty could have been surmounted by the plaintiff.

(1) M. L. R. 6 Q. B. 405.

I am of opinion that the judgment should be confirmed for the second reason given by the Court below.

MacLennan, Howard & Aylmer, for the plaintiff.
Bastien, Bergeron & Cousineau, for the defendant.

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MONTREAL, May 31st 1906.

Present :—SIR M. M. TAIT, chief justice, ARCHIBALD AND ROBIDOUX, JJ.

LAVALLÉE v. DUBEAU.

Work by contract (à forfait)—Part payment and acceptance of receipt on account of what is due to the contractor—Plea that work is worthless—Estoppel.

HELD :—A party sued for the balance of the price of work performed by contract (*à forfait*) who has made a part payment to, and taken a receipt from, the contractor, on account of what is due him, is estopped from setting up the defence that the whole work is bad and worthless.

Judgment of the Superior Court CHARBONNEAU, J., confirmed.

ARCHIBALD, J.:—

This is an action by the plaintiff to recover the balance of the price of certain work which he alleged to have performed for the defendant.

In the autumn of 1903 there existed an unfinished chapel belonging to the defendant which he had caused to be constructed earlier. This chapel contained only wooden walls on a stone foundation, but the stone foundation had been pre-

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pared to receive brick. The work to be done consisted in bricking over these wooden walls and in lengthening the structure by a certain number of feet and in plastering the same. There was besides a separate contract for building a small bell tower on the construction.

The first contract which referred to the building proper, was for the sum of three hundred and twenty-five dollars, and the bell tower was to cost seventy-five dollars.

The plaintiff says that he did all the work to the building for which he was to receive the \$325.00 ; that he was hindered by the defendant from doing the work to the bell tower, and that he suffered a loss of \$25.00 by reason of the defendant hindering him, which made altogether \$425.00. Of this sum the plaintiff acknowledged to have received, in different amounts, the sum of \$200.00 and he sues for the balance of \$225.00.

The defendant says that the work is not only unfinished, but what has been done is not acceptable, and must all be done over again, and he refuses to pay and asks the dismissal of the action.

The Judge has found that the work is of a common description, but that all the work which was to be done to the building, excepting for an amount of \$8.25 for something remaining unfinished to the steps and a *prie-Dieu*, was done, and he deducts this \$8.25 from the amount of the contract for the building proper.

As to the bell tower, he says that that was unfinished and also he indicates the position taken by the plaintiff that the defendant had prevented him from finishing the bell tower, but he holds that it was a separate contract and therefore that it could not have the effect of rendering the action on the other contract premature by reason of the work being unfinished. He therefore dismisses that portion of the plaintiff's claim referring to the bell tower, reserving the plaintiff's recourse when he shall have finished the work. As to the other he deducts \$8.25 from the \$325, and credits the defendant

with \$200. and gives judgment for one hundred and sixteen dollars and seventy-five cents (\$116.75).

The Judge found the evidence exceedingly contradictory, but comes to the conclusion upon weighing the evidence, that the work such as reasonably anticipated by the plaintiff was practically completed in accordance with the real meaning of the contract.

Certain letters of the defendant are produced which indicate that he was very anxious that the work should be done as cheaply as possible, and the work which was previously done appears to have been of a common description, and the Judge finds that the work done by the plaintiff was fairly of the same character as that so previously done.

The defendant was present, saw the work as it progressed, paid from time to time different amounts on account of the price, accepted a receipt from the plaintiff even as late as June 1904 after the work was completely finished or nearly so, in the following terms : "Received from R. S. Dubeau the "sum of fifty dollars (\$50.00) on account of what he owes me. "I promise to finish the chapel for the first of July next. "(Signed) Léandre Lavallée." This receipt was dated the 13th of June 1904. At that time there is proof that the defendant was well aware of the exact condition of the work and yet he pays the sum of \$50.00 and takes a receipt on account, containing the words "on account of what he owes me," and containing also an engagement to finish the chapel. The pretence then of the defendant that nothing which has been done was acceptable, and that everything had to be redone seems to me untenable.

The Judge below has had an opportunity of seeing the witnesses and judging as to the value of their testimony by all the indications which the Judge of first instance is able to avail himself of. The conduct of the defendant as above set forth seems also to justify the inference that whatever witnesses may have thought of the condition of the building, he himself was satisfied, with the exception of some small items which remained to be finished.

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It is unusual for a Court of Review or Appeal to set aside a judgment of the first Court where the evidence is contradictory, by substituting the evidence of one set of witnesses for that of another set which the Judge below considered more worthy of credence.

Under these circumstances, it seems to me that it would be hazardous in this Court to reverse the judgment of the first Court. We are therefore disposed to confirm with costs.

J. B. Brousseau, for the plaintiff.

J. A. Piette, for the defendant.

COURT OF REVIEW.

MONTREAL, March 31st 1906.

Présent :—SIR MELBOURNE M. TAIT, Chief Justice, ARCHIBALD AND PARADIS, JJ.

BERNARD, ES-QUAL. v. J. A. HURTEAU & CO, LIMITED.

Contracts—Subscription by minor to capital in joint stock company—Lesion—Contract of minor annullable for lesion.

Held :—A subscription by a minor to the capital of a joint stock company, however flourishing, is annullable for lesion, if the payments that may be required under it exceed the means of the subscriber.

Judgment of the Superior Court, ROBIDOUX, J., confirmed.

ARCHIBALD, J. :—

This is a review of a judgment rendered by the Superior Court maintaining the plaintiff's action. He sues as the

tutor of his minor son to set aside a subscription of twenty shares of the face value of \$2,000.00. in the capital stock of the company defendant; and to recover a balance of salary earned by his minor son as an employee of the company.

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The judgment complained of awarded to the plaintiff two small sums of money, namely, \$8.57 which the defendant claimed to have paid for the board of the minor and \$10.55 of interest which it had collected on the balance due on the stock subscribed.

The judgment also set aside the subscription of stock on the ground of lesion.

The defendant pleaded that there was no lesion and that the subscription to the stock was valid ; that it was made in accordance with a condition of employment by the company that all its employees should be stock-holders ; that the defendants undertook to appoint the plaintiff's minor son as secretary-treasurer of the company at a salary of \$40.00 a month, but that appointment was conditional on his subscribing \$2,000 in the capital stock of the company ; that the company was flourishing and its stock was at all time fully worth par, and that there was no lesion.

The Judge held that the subscription to the stock was entirely beyond the means of the minor ; that indeed in paying up 25% thereof he had exhausted all his possessions and had no means to pay any further calls and that the contract was a lesion, whether the said company was flourishing or not, because the minor having no means to pay the balance of the stock, was exposed at any time to lose the amount which he had actually paid.

It appears that the company defendant was a company incorporated just before the subscription to the stock by the plaintiff's minor son, to take over the business of pianos and musical instruments theretofore conducted in the City of Montreal.

It appears also by the factum of the company defendant

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who is now appealing from the judgment rendered in this case, that it had just then acquired the whole of the assets of the old partnership of J. A. Hurteau & Co., valued at \$14,580.29 over and above its liabilities in consideration of an equal quantity of shares in the new company at par, and charged itself with the payment of \$13,879.42 of debts, that is to say, that the new company took over the business of the old company, at the par estimation contained in its books.

It is at once seen that the transaction between the company defendant and the late firm of J. A. Hurteau & Co was one manifestly to the advantage of the latter. The amount of debt in proportion to inventory value of the assets is exceedingly large and would, I think under ordinary circumstances, be strongly suggestive of business difficulties.

The defendants state that large dividends have been paid by the new company since its incorporation.

That fact is not by any means conclusive of the condition of the company. The judgment however has held that, apart from the prosperous condition of the company, the contract made by the plaintiff's minor son was imprudent and such as to constitute lesion.

The defendant relies upon the contract by which the plaintiff's minor son was engaged to show that no matter what would happen he could not be injured, because his payments would be made out of the earnings of his capital and out of his wages.

Such a contract as that is not binding on the directors of a joint stock company. The share-holders of that company are upon a footing of equality and it is the duty of the directors to treat every one alike, so that any such a provision or contract by which one share-holder was favored as against others would be wholly illegal and impracticable.

It appears also in the case, that although the share-holders generally had only paid out 25% of their capital stock yet they would be entitled to draw dividends upon the whole of their capital stock, in consequence of having deposited with

the company their promissory notes for the balance of capital stock unpaid upon which they undertook to pay 7% interest.

This also was an illegal procedure, and such as to favor the share-holders who deposited their promissory notes, as against those who did not do so. The plaintiff's minor son, of course, refused to deposit his promissory note, seeing the contract which he had with the company.

It is alleged that the company paid 16% dividend. The result would be that 9% would pass on the unpaid capital stock of the share-holders other than the plaintiff's minor son, and they would be paid out of the earnings of the company in addition to what the plaintiff's minor son would be entitled to.

My opinion is that the Judge below was very well founded in finding that the contract of this minor was an unwise one, and one which would in all probability result in his losing the money which he had already advanced.

The item of \$10.50 interest charged on the unpaid amount of capital stock of course follows the setting aside of the stock subscription.

As for item of \$8.57 that is founded upon an appreciation of proof, and would be mere trifling in the Court of Review to set aside a judgment founded on appreciation of conflicting evidence for such an amount.

The judgment is confirmed.

Lamothe & Trudel, for the plaintiff.

Bernard & Chalifoux, for the defendant.

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COURT OF REVIEW

MONTREAL, April 28th 1906.

Present :—ARCHIBALD, ROBIDOUX AND PARADIS, JJ.

DAOUST v. CHARBONNEAU.

Liability for tort—Libel—Statements—Qualified privilege made by a garnishee in his declaration.

HELD :—No action will be lie for defamatory statements made in good faith by a garnishee in his declaration upon a seizure by garnishment.

Judgment of the Superior Court, PAGNUELO, J., confirmed.

ARCHIBALD, J. :—

This is an action of damages for alleged libel contained in a declaration annexed to a *saisie-arrest*.

The defendant had alleged in substance in a declaration made by him as garnishee, that the defendant Lamarche, acting by his agent O. Daoust, the plaintiff had filed a statement of his weekly salary and deposed ridiculously small sums in a case of *Brisson v. Lamarche*; that Daoust was the holder or transferee of several judgments against Lamarche whom he had caused to produce new statements of salary in several cases with the illegal object of getting paid his costs by privilege, to the detriment of himself (Charbonneau) and of the other creditors of Lamarche and in contempt of their acquired rights in virtue of the first statement filed in the case of *Brisson vs Lamarche*; that in a case of *Perron vs Lamarche*, Daoust had produced two exaggerated claims purely apparent and inexistent, the one for \$523.46 and the other for \$225.65, with the object of swallowing up (*englober*) the whole amount deposited; that these proceedings had been made by Lamarche and Daoust collusively and illegally.

The plaintiff considered these allegations libellous.

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The defendant pleaded that he had no personal knowledge of any of these facts ; that he had a claim for rent against Lamarche for the sum of \$36.00 that he had put this claim into the hands of one Major for collection, by whom all the proceedings had been taken ; that moreover there was nothing libellous in the language complained of by the plaintiff, and that it was justified by the proceedings had in the several cases referred to.

The Judge below found in all points in favor of the defendant and dismissed the plaintiff's action.

It appears clear from the proceedings of record that, to a greater or lesser extent at any rate, the language used by the defendant through his agent Major was justified.

There did appear an effort on the part of Daoust, the agent of Lamarche, to impede the other creditors of the latter in their efforts to get paid. The language used in the proceedings complained of by the plaintiff may have been somewhat stronger than the circumstances justified, but it is clear that it was made in good faith, and it seems to me that it was not only useful but essential to the proceeding in which it was made. Some such allegation required to be made in order to justify the issue of a writ of *saisie-arrest* in the case in which that seizure was issued, inasmuch as the law relating to the matter denies the right to attach a workman's salary after it has been attached in one case and declarations made and the seizable part of his salary deposited from week to week in that case.

In the present instance Daoust had got Lamarche to declare in other causes, which would have the effect of compelling the present defendant to follow and made his claim in those other causes, and would postpone the defendant's claim to the costs incurred on these new declarations.

The circumstances did justify the present defendant in supposing that his interests were being voluntarily and wilfully opposed by the present plaintiff Daoust acting as agent of Lamarche.

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In so far as regards libels supposed to be contained in pleadings in a Court of justice, very watchful regard must be taken in order to keep free genuine recourse for the obtaining of justice, and that nobody should be intimidated in coming before a Court of justice and in alleging what he supposes to be true facts although these might convey imputations of misconduct on the part of other people. It is a matter of public policy that access to the Courts should be free, and that persons should come there without intimidation, and should be at liberty to allege all matters which in good faith they suppose to be true although containing imputations of misconduct of others and even if subsequently proof of these imputations cannot be made.

In the present instance there does not appear to me to be any ground whatever for disturbing the judgment of the first Court. If the imputations were not entirely true, they were supposed to be true, and were besides founded upon very good grounds.

The plaintiff has nothing, in my opinion, to complain of, and the judgment is therefore confirmed with costs.

Pelletier & Létourneau, for the plaintiff.
C. A. Archambault, for the defendant.

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MONTREAL, April 28th 1906.

Present :—ARCHIBALD, ROBIDOUX AND PARADIS, JJ.

SHOVELIN ET VIR V. HANSON.

Master and servant—Failure of servant to comply with instructions—Liability for charges payable on delivery of goods—Payments by servant without orders—Liability of master.

HELD:—10. A driver employed by a laundryman to deliver laundry to

customers and specially instructed to do so only on payment of charges, is liable for, and will be condemned to pay his employers, charges which he has failed to collect in violation of his instructions.

20. Nor is the employer bound to refund the driver sums paid by the latter to customers for goods lost while in the hands of the former.

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Judgment of the Superior Court PAGNUELO, J., confirmed.

ARCHIBALD, J. :—

The plaintiff conducts a laundry in the City of Montreal and the defendant was one of her drivers.

The plaintiff complains that the defendant was in her debt in a sum exceeding \$200.00 for moneys which he ought to have collected from her customers to whom he delivered their laundry.

The defendant denies this indebtedness and says that he returned to the plaintiff all the moneys which he received from the customers ; that it was customary to give credit to customers and was necessary in the plaintiff's business, otherwise it would be impossible to retain them, and the defendant besides says that he paid out of his own money to the customers a sum of \$69.00 for articles which had been lost, while under the plaintiff's charge.

The judgment finds that the plaintiff's instructions to the defendant were that he should not leave laundry unless he received the charges therefor, and as to the sum which the defendant claims as having been paid by him, the plaintiff declares that she not only did authorize the defendant to pay any such charges, but when requested to do so by the defendant, refused to do so, but promised to take into consideration any such claims that might be made.

The judgment has found that the defendant had no right to give credit to customers ; that if he did give credit it was at his own risk, and further that he had no right to pay any sums of money to the plaintiff's customers for loss of goods without

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her consent, and the judgment maintains the plaintiff's action for the sum of \$185.00.

The proof is sufficiently clear that the defendant delivered laundried articles to different customers without collecting the charges in the sum claimed by the action. Whether the defendant had collected these amounts or not is not shown at all by the proof, except by the statement made by the defendant himself under oath that he had returned to the plaintiff all the cash which he had collected.

The defendant examined several witnesses to prove that it was customary and even necessary in the laundry business to give credit to the customers, but these witnesses do not appear to establish the defendant's case, because most of them state that when such credit is given, the amounts so credited to the customers are charged against the driver in the employer's account.

We can see no reason for interfering with the judgment upon that point, and as to the claim that the defendant is entitled to get credit for \$69.00 paid by him for lost goods, we cannot see that a man can forcibly mix himself up with the business of another party and compel that other party to refund him what he has paid in that connection.

I am well aware that the "*negotiorum gestor*" can collect from the person whose business he has managed the amounts which he has disposed of in such manner, but this is not a case of "*negotiorum gestor*" and the rules relating to that do not apply.

I am of opinion to confirm the judgment.

W. Mercier, K. C., for the plaintiff.

Monty & Duranleau, for the defendant.

COURT OF REVIEW.

MONTREAL, March 31st 1906.

Present :—SIR MELBOURNE M. TAIT, Chief Justice, ARCHIBALD AND ROBIDOUX, JJ.

PAPINEAU v. JASMIN.

Liability for tort—Timber cut in trespass—Contiguous lands without settled boundary—Presumption of error and good faith.

ERRATUM

The report of the case of *SHOVELIN ET VIE v. HANSON* at page 190 was published by error and should not be considered or referred to as a precedent. A corrected report of the case will be inserted in the next number of the present volume.

(*Editor's note*)

OF \$102.00 AND HAS GIVEN JUDGMENT FOR THAT AMOUNT.

The principal plea of the defendant is that the line between the two properties has never been drawn legally, and that there existed several apparent lines and that an action in damages will not lie until the line has been judicially established.

During the course of the action the defendant moved for suspension until an action *en bornage* might be taken and the line judicially determined, but the plaintiff alleges that the line of his property was clear and distinctly recognizable and recognized by the defendant and his authors, and that the other lines of which the defendant speaks were made in bad faith by the defendant himself, for the purpose of creating con-

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her consent, and the judgment maintains the plaintiff's action for the sum of \$185.00.

The proof is sufficiently clear that the defendant delivered laundried articles to different customers without collecting the charges in the sum claimed by the action. Whether the defendant had collected these amounts or not is not shown at all by the proof, except by the statement made by the defendant himself under oath that he had returned to the plaintiff all the cash which he had collected.

The defendant examined several witnesses to prove that it was customary and even necessary in the laundry business to give credit to the customers, but these witnesses do not ap-

case of "*negotiorum gestor*" and the rules relating to that do not apply.

I am of opinion to confirm the judgment.

W. Mercier, K. C., for the plaintiff.

Monty & Duranleau, for the defendant.

COURT OF REVIEW.

MONTREAL, March 31st 1906.

Present :—SIR MELBOURNE M. TAIT, Chief Justice, ARCHIBALD AND ROBIDOUX, JJ.

PAPINEAU v. JASMIN.

Liability for tort—Timber cut in trespass—Contiguous lands without settled boundary—Presumption of error and good faith.

HELD :—The rule that an action will not lie to recover the value of timber cut in trespass where the boundary has not been settled between contiguous lands, applies to cases of presumed error and good faith, but not to cases of undoubted and inexcusable trespass.

Judgment of the Superior Court, TASCHEREAU, J., confirmed.

ARCHIBALD, J. :—

This is an action for \$150.00 damages caused to the plaintiff by the defendant having cut logs on the plaintiff's property.

The Court has found in favor of the plaintiff to the amount of \$102.00 and has given judgment for that amount.

The principal plea of the defendant is that the line between the two properties has never been drawn legally, and that there existed several apparent lines and that an action in damages will not lie until the line has been judicially established.

During the course of the action the defendant moved for suspension until an action *en bornage* might be taken and the line judicially determined, but the plaintiff alleges that the line of his property was clear and distinctly recognizable and recognized by the defendant and his authors, and that the other lines of which the defendant speaks were made in bad faith by the defendant himself, for the purpose of creating con-

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fusion, and this allegation is found to be verified by the judgment.

It appears from the proof that the line which the plaintiff claims to be the true line was and has been always a line clearly marked, although not judicially determined, recognizable easily, recognized by the defendant and it appears further that upon action by the defendant himself, the line has since been determined as the true line.

There are reasons doubtless, why an action of this kind ought not to be determined before a judicial determination of the true boundary and in all probability I would have been disposed to have suspended the proceedings in this case until such determination had been made, and that has not been done, but under the circumstances of this case it does not appear that any injustice has been done; it is a case of undoubted and inexcusable trespass, and the judgment condemning the defendant to pay the sum in question appears to be an equitable one, and is not a contradiction with any law either of substance or proceeding.

I am of opinion to confirm the judgment with costs.

J. A. C. Ethier, K. C., for the plaintiff.

Prévost & Rincret, for the defendant.

COUR DE RÉVISION.

QUÉBEC, 29 février 1904.

Présents:—SIR L. N. CASALT, juge en chef, ANDREWS
 ET LANGELIER, JJ.

LA CIE DE PULPE DE CHICOUTIMI v. RACINE.

Propriété—Distinction des biens—Terrains bornés aux rivières et rongés par les eaux—Travaux de préservation. Domaine public et domaine privé—Concession par la Couronne de terrains comme tombés dans le domaine public—Fardeau de la preuve.

Jugé:—10. Un terrain borné à une rivière navigable et graduellement emporté par l'affouillement de l'eau, ne cesse d'être dans le domaine privé pour tomber dans le domaine public, que lorsqu'il a été définitivement envahi et est devenu partie du lit de la rivière. Tant que le sol est préservé ou recouvert par des travaux exécutés par le propriétaire ou des tiers, le terrain dont il forme partie reste dans le domaine privé, et la concession que la Couronne prétend en faire par lettres patentes comme dépendance du domaine public est nulle.

20. C'est au concessionnaire en vertu d'un tel titre, à qui on oppose le fait que le terrain a antérieurement formé partie du domaine privé, qu'il incombe de prouver comment il en est sorti pour tomber dans le domaine public. Par suite, à défaut de cette preuve, il ne saurait fonder sur un pareil titre, comme lui donnant le droit de propriété, une action en bornage contre le propriétaire d'un terrain contigu.

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Le jugement de la Cour Supérieure, CIMON, J., qui est confirmé, a été rendu le 26 novembre 1903, comme suit :

CIMON, J. :—

En 1845, le gouvernement avait fait arpenter ou diviser une certaine portion du township de Chicoutimi en lots de village, avec rues et places publiques ; la demanderesse a elle-même produit un extrait officiel de ce plan, et la défenderesse en a produit une copie officielle. C'est une division que l'on désigne sous le nom de "division primitive."

Or, cette portion de territoire ainsi divisée en village a été, sous l'autorité de la 26 Vict. ch. LIV, statut sanctionné le 12 mai 1863, érigée en village sous le nom de "village de Chicoutimi", et dans lequel on trouve les sections 2 et 9 de ce statut qui suivent :

Section 2.— "La municipalité du village de Chicoutimi se composera de toute cette partie du township de Chicoutimi divisée en lots de village et de parc et désignée et connue sous le nom de "village de Chicoutimi."

Section 9.— "Le conseil municipal du "village de Chicoutimi" aura le droit de faire cesser, enlever et empêcher tout empiètement dans et sur les terrains laissés pour l'ouverture des rues de front et transversales dans le dit village... en vertu des dispositions de la 49ème section de l'acte municipal "refondu du Bas-Canada."

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Puis, le village de Chicoutimi ensuite est tombé sous les dispositions du code municipal dont l'article 76, tel qu'il était originairement, c'est-à-dire le 2 novembre 1871, se lit comme suit :

C. M. Art. 767.—"Tout conseil de village est propriétaire du "terrain acquis ou réservé pour des rues et places publiques."

Cet article a été amendé par la 48 Vict. ch. 28, sec. 14, mais le village de Chicoutimi était alors érigé en ville par une charte spéciale, et cet amendement ne s'applique pas à la ville de Chicoutimi.

C'est le statut 42-43 Vict. ch. 61, sanctionné le trente et un octobre 1879, qui a érigé la ville de Chicoutimi.

En voici les sections 2 et 22 :

2.—"La municipalité de la ville de Chicoutimi comprendra "la municipalité actuelle du village de Chicoutimi et de plus "le No 74 du premierr ang nord-est du canton de Chicoutimi."

Section 22.—"La dite ville de Chicoutimi est propriétaire "des terrains réservés lors de la division du village de Chicou- "timi par ordre du gouvernement pour des rues et places pu- "bliques."

Il ne peut donc y avoir aucun doute que par la loi, le villa- ge de Chicoutimi et, ensuite, la ville de Chicoutimi qui lui a succédé, est propriétaire depuis le 2 novembre 1871, date de la mise en force du code municipal, de ces terrains réservés pour des rues ou chemins dans l'arpentage fait par le gouver- nement du village de Chicoutimi, en 1845.

On ne trouve pas au dossier les lettres patentes de la défen- deresse, ni le cadastre de la ville de Chicoutimi, toutefois il ne peut y avoir aucun doute que les lots Nos 271, 272 et 273 du cadastre que la demanderesse dit, dans son action, appartenir à la défenderesse depuis un grand nombre d'années, comprennent les lots Nos 13, 14 et 15 de cette division primitive du village de Chicoutimi. Ces faits sont adunis par les parties et leurs témoins.

Le témoin William Tremblay, de la demanderesse, a dit ce qu'étaient les lots de la défenderesse avant qu'aucune partie d'iceux ne fût emportée par les eaux et quelle est l'étendue du

terrain de la défenderesse qui a été brisée et dont la surface a été enlevée par les eaux et a montré aussi où est, à cet endroit, le chemin réservé dans cet arpentage primitif et ce qui en reste aujourd'hui.

Le lot de grève qui aurait été concédé à la demanderesse a été parfaitement localisé par l'arpenteur Gauvin et par l'arpenteur Tremblay, et ce lot de grève serait exactement et absolument ce qui est compris entre les lignes rouges tracées par l'arpenteur Tremblay, à la demande de la demanderesse, dans l'extrait du plan de l'arpentage primitif, exhibit No 1 de la demanderesse. Voir témoignage Gauvin, plan exhibit 6 de la demanderesse, et voir aussi photographie du lot de grève qui est absolument en accord avec William Tremblay.

Ainsi, la demanderesse a donc elle-même adopté le plan exhibit 2 avec la réduction en ligne rouge, que l'arpenteur Tremblay y a faite du plan No 1, qui fait la base de l'action comme la base de ses prétentions et comme montrant l'état des lieux, lors de l'arpentage primitif, et l'état des lieux actuel.

L'arpenteur Tremblay dit que ce terrain de la défenderesse "se mangeait par les eaux," qu'on y a construit, il y a une dizaine d'années, des quais en *slabs* qui sont la continuation de ceux qu'il y avait au sud.

On voit par le plan exhibit 2 de la demanderesse qui fait preuve contre elle, que, quant aux autres parties des lots Nos 15 et 13, ces lots seraient contigus au chemin ou rue réservée lors de l'arpentage primitif.

Comme l'a dit l'arpenteur Tremblay, les quais traversaient cette rue jusqu'à ce qu'ils viennent à toucher le lot No 15, alors que les dits quais le traversent et traversent ensuite les lots Nos 14 et 13 et puis la rue au nord de ce lot No 13.

Il appert au témoignage de William Tremblay que la terre à cet endroit a déboulé et que les quais se trouvent compris et situés sur le terrain de la défenderesse et que pour donner le lot de grève à la demanderesse, il faut le prendre sur le terrain même qui, d'après William Tremblay, s'étendait à deux cents pieds plus loin dans le bassin. L'arpenteur Boivin, autre témoin de la demanderesse, admet que le lot de grève réclamé

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serait sous les quais et entoure les terrains de la défenderesse.

Gauvin, l'arpenteur, autre témoin de la demanderesse, dit que ces quais, qui entourent les terrains de la défenderesse, sont "un véritable remblai", qui couvre les deux laisses de haute et basse mer, et il dit que ce qui a été concédé à la demanderesse, c'est le terrain incliné de A à B sur le plan VI, terrain *entièrement* sous ce remblai, et c'est aussi ce que la demanderesse réclame.

Gauvin nous dit que ce remblai est un ouvrage rapporté pour exhausser le terrain, pour racheter la différence de niveau et dont l'effet est d'arrêter les affouillements de la marée et d'empêcher les éboulements et que c'est évidemment pour cela qu'il a été fait.

Il est vrai que ce remblai ou ces quais ont été faits par M. Price.

Mais M. Blair, l'agent de M. Price, sous le contrôle duquel ils ont été construits, dit que M. Price avait un droit de passage sur les terrains de la défenderesse, et que ces quais ont été faits et dans l'intérêt de la maison Price et dans celui de la défenderesse, et, en même temps, ces quais étaient dans l'intérêt de la ville de Chicoutimi, propriétaire du terrain du chemin qu'ils protégeaient et qu'ils conservaient.

Les témoins de la défenderesse ont répété clairement que le terrain sur lequel reposent ces quais était auparavant, avant les éboulis, un terrain solide et en prairie, appartenant à la défenderesse.

La demanderesse a allégué être en possession de ce lot de grève, mais elle n'a prouvé aucun acte de possession de la partie qui se trouverait sous les quais qui entourent les terrains de la défenderesse, ni des quais. Elle ne peut opposer à la défenderesse les actes de possession qu'elle a faits ailleurs, car ils ne l'intéressaient pas, et la demanderesse n'a prouvé aucun acte de possession au nord du quai de Ste Anne.

Et d'un autre côté, il paraît, surtout par le témoignage de Savard, qui n'est pas contredit, que c'est la défenderesse qui était et est en possession de ces quais qui bordent le terrain.

Il est vrai qu'à un certain endroit, à la pointe, des parties de ces quais ont été enlevés par les eaux depuis l'action, mais ça ne fait pas de différence.

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Le droit de protection, comme celui de défense, est naturel. Il a toujours été permis au propriétaire de fortifier sa rive ; il y a au Code Justinien une disposition à cet effet : *ripam suam adversus rapidi amnis impetum munire prohibitum non est*. Code, Livre VII, titre 41, sec. 1.

Vide aussi Digeste, Livre 43, titre 13, livre 1, ss. 6 et 7.

Le prêteur avait un édit spécial conçu en ces termes : "Je défends qu'on empêche un particulier de faire des ouvrages dans une rivière publique ou sur la rive, qui doivent servir à fortifier la rive ou à défendre contre les accidents de l'eau, les terres qui sont le long de la rive." Dig. Livre 43, titre 15, section 1.

La loi romaine ajoute : "Il est très utile de réparer et de fortifier les rives des rivières publiques." Idem, sec. 1.

C'est aussi ce qui a été décidé dans la cause de *Brown vs Gugy* (1).

Le juge en chef Lafontaine dit que celui qui veut ainsi protéger sa propriété contre l'action des eaux peut invoquer Daviel, titre 1, No 692, qui dit : "La faculté de munir et de fortifier contre l'action des eaux les rives de son héritage, de reconquérir par des travaux de cette sorte ce que l'action des eaux a enlevé, est un accessoire *essentiel* du droit de propriété ; c'est le droit naturel de conservation."

Mais dans le présent cas, il est clair que tout ce remblai et tous ces quais reposent entièrement sur ce terrain qui appartient à la défenderesse, quant aux lots 13, 14 et 15, ou à la ville de Chicoutimi, quant au chemin réservé ; c'est ce terrain qui est aujourd'hui réclaté par la demanderesse ; et la question n'est pas de savoir si le riverain, pour protéger sa propriété, a le droit, contre la Couronne, de faire des travaux dans la rivière ou sur un rivage public appartenant à la Cou-

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ronne ; mais la question est de savoir si ce terrain, qui appartient à la défenderesse et à la ville de Chicoutimi, a cessé de leur appartenir par l'action des eaux, c'est-à-dire :

Les eaux avaient-elles une conquête complète et permanente du terrain sur lequel ces quais ou ce remblai a été assis, en sorte que ce terrain aurait cessé d'appartenir à la défenderesse ou à la ville de Chicoutimi, selon le cas, et serait devenu la propriété de la Couronne, lorsque ces quais ou ce remblai ont été faits.

C'est là véritablement le seul point à décider.

Comme le dit Demolombe, Vol. 10, No 175, cette question est fort délicate. "La manière dont le terrain aurait été envahi par les eaux, lentement et brusquement, l'étendue plus ou moins considérable du terrain envahi, la durée plus ou moins prolongée de l'occupation par les eaux, tels sont les principaux éléments de solution."

Or, dans le cas actuel, pour employer l'expression des témoins, l'eau mangeait cinq à six pieds de terrain de la défenderesse par année, d'après William Tremblay, et, dans sa seconde déposition, il ajoute que l'eau aurait ainsi mangé, en outre de la rue, deux cents pieds de terrain de la défenderesse.

Le remblai ou les quais qui protègent le terrain de la défenderesse auraient été construits vers 1891 ou 1892.

Les témoins, William Tremblay entre autres, dans sa seconde déposition, disent qu'ils ont vu, en prairie, possédée et exploitée par la défenderesse, le terrain sur lequel sont assis ces quais. Il y avait un accore très incliné et les témoins ont vu le terrain par cinq ou six pieds annuellement éboulé ; ce terrain éboulait par morceaux avec les racines des herbes qui y croissaient et qui les tenaient fermes ; ces morceaux restaient un certain temps au pied de l'accore avant d'être entraînés complètement.

Ces morceaux de terre équivalent bien à ce qu'on appelait dans l'ancien droit "Motte de terre" ou "Motte ferme" *Vide* Merlin, "Motte de terre" ; 2 Fournel, Voisinage, page 293 ; Ferrière Dict., "Motte ferme."

Ces morceaux de terre, propriété de la défenderesse, se trou-

vaient en tombant au pied de l'accore sur le terrain même de la défenderesse ; ils y séjournèrent un certain temps, puis ils étaient remplacés par d'autres ; c'était une possession du pied de l'accore qui profitait à la défenderesse. C'est la même chose pour le chemin réservé quant aux quais reposant sur le terrain de ce chemin.

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Il y avait donc résistance à la violence des eaux.

Mais la défenderesse a effectivement résisté à la violence des eaux comme elle en avait le droit, et ces quais ou ce remblai ont été construits, ce qui a empêché ensuite les éboulements et protégé son terrain ; ces quais sont entièrement chez elle, sur son terrain.

Peu importe qu'ils aient été construits par M. Price. C'était avec le consentement et dans l'intérêt de la défenderesse.

Et il en est de même quant à la ville de Chicoutimi pour le chemin réservé.

Il ne faut pas oublier l'art. 414 de notre code civil qui dit : La propriété du sol emporte la propriété du dessus et du dessous.

Et parce que les eaux auraient enlevé le dessus, la défenderesse restait tout de même propriétaire du dessous, tant que la rivière n'aurait pas fait une conquête complète et définitive de ce dessous.

Et je ne crois pas que la preuve puisse permettre de dire qu'il y a eu effectivement une telle conquête du terrain couvert par ces quais.

Et si, dans le présent cas, les eaux avaient paru envahir dans un certain moment, à cet endroit, le terrain de la défenderesse, elle les a repoussées, elle a retenu son terrain par ces quais qui existent depuis dix à douze ans, montrant à l'évidence que la conquête des eaux n'a pas été parfaite et c'est la défenderesse, par ces quais ou ce remblai, qui a la maîtrise de ce terrain et non l'eau.

Et on peut dire la même chose quant au chemin réservé et donné à la ville de Chicoutimi.

La demanderesse n'a donc aucun lot de grève à borner avec la défenderesse.

J'ajouterai que la défenderesse étant en possession de ces

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quais et, en conséquence, du terrain sur lequel ils reposent, ayant eu le titre de propriété de ce terrain, il incombait à la demanderesse, qui est aux droits de la Couronne, de prouver clairement que la défenderesse avait perdu, par l'action des eaux, la propriété de ce terrain et que ce terrain était entré dans le domaine de la Couronne, lorsque les quais ont été construits, et, d'après moi, cette preuve n'existe pas d'une manière suffisante.

Mais la demanderesse dit que si la défenderesse a conservé son terrain à l'endroit de ces quais, alors ce terrain de la défenderesse couperait le lot de grève en deux et il y aurait lieu au bornage aux endroits où ce lot de grève est ainsi coupé.

D'après cette allégation, dit la demanderesse, "la partie sud du dit lot de grève serait contiguë, par le côté nord, au côté sud du lot 273 de la défenderesse et la partie nord du lot de grève contiguë par le sud, au côté nord du lot No 271 de la demanderesse."

Cette prétention de la demanderesse est fausse en fait. D'abord, quant au nord du No 13, plan exhibit 2 de la demanderesse, William Tremblay nous dit que le chemin réservé et appartenant à la ville de Chicoutimi existe encore là, en sorte que c'est à ce chemin que le terrain de la défenderesse serait contigu et il n'y a que la ville de Chicoutimi qui ait droit de l'appeler à borner là.

La demanderesse a fixé sa position en adoptant pour base de ses prétentions le plan exhibit 2, en y traçant en lignes rouges le site de son lot de grève.

Et à la simple vue de ce plan, il est évident, en tenant compte de la preuve, que la demanderesse n'a aucun lot de grève contigu au terrain de la défenderesse, car les quais sous lesquels la demanderesse voudrait prendre son lot de grève recouvre le terrain réservé pour ce chemin, lequel appartient à la ville, et la demanderesse n'a pas montré que ce terrain avait cessé d'appartenir à la ville, et c'est en conséquence ce terrain appartenant à la ville, et non aucun terrain appartenant à la demanderesse, qui toucherait le lot 15 à l'endroit où les quais le traverseraient.

Et quant aux autres parties de ce lot No 15, ça serait encore le terrain du chemin appartenant à la ville qui le toucherait et non aucun terrain de la demanderesse.

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On voit sur ce plan, exhibit 2 de la demanderesse, entre ce lot No 15 et la première ligne rouge, une certaine lisière de ce chemin.

En résumé :

1.—Il n'a pas été montré que la défenderesse ou la ville de Chicoutimi, selon le cas, ait, par l'action des eaux, perdu leur terrain (sous les quais), qui serait rentré dans le domaine de la Couronne.

Cette preuve incombait à la demanderesse et elle devait être claire et certaine.

2.—Il résulte d'ailleurs de la preuve et des documents, que la défenderesse a été propriétaire des terrains sur lesquels reposent ces quais, et, quand ces quais reposent à l'endroit réservé pour une rue, c'est la ville de Chicoutimi qui est propriétaire du terrain.

3.—Le terrain de la défenderesse n'est contigu à aucun terrain de la demanderesse.

Si la défenderesse avait borné avec la demanderesse aux endroits mentionnés dans la réponse de celle-ci, ce bornage ne pourrait lier la ville de Chicoutimi, qui, étant la propriétaire à cet endroit des terrains qui touchent à ceux de la demanderesse, pourrait requérir un autre bornage de celle-ci.

La demanderesse n'a aucun titre lui permettant d'exiger un bornage avec la défenderesse.

Je crois donc que l'action doit être déboutée avec dépens.

Et vû les raisons qui me dictent cette conclusion, il est inutile que j'exprime d'opinion sur la question du hâvre.

JUGEMENT DE LA COUR DE RÉVISION

LANGELIER, J. : —

La demanderesse a poursuivi la défenderesse en bornage.

La défenderesse a plaidé, en résumé, que la demanderesse n'était pas propriétaire de l'immeuble dont elle demande le

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bornage avec le sien, et que ces immeubles n'étaient pas contigus.

Le tribunal de première instance a renvoyé l'action de la demanderesse sur le motif que la demanderesse n'avait pas prouvé qu'elle était propriétaire du terrain qu'elle veut faire borner.

Voici les faits de la cause. Le terrain dont la demanderesse se prétend propriétaire, et dont elle demande le bornage a certainement appartenu autrefois à la défenderesse. La demanderesse l'admet dans son factum. Il a même constitué une prairie. Mais il a été rongé par les eaux de la rivière Chicoutimi et, sans les travaux dont je parlerai plus loin, il y a longtemps qu'il serait entièrement recouvert par les eaux de la rivière, et devenu partie de celle-ci. Le gouvernement de la province, le considérant comme ayant été complètement conquis par les eaux de la rivière, et tombé comme partie de celle-ci, qui est navigable, dans le domaine public, l'a concédé à la demanderesse.

La défenderesse soutient que, même si ce terrain était devenu partie du domaine public, le gouvernement de la province n'avait pas le droit d'en faire la concession, parce qu'il forme partie du hâvre de Chicoutimi, qui est un hâvre public, et comme tel, appartient au gouvernement du Canada.

Le jugement du tribunal de première instance qui a renvoyé l'action s'appuie exclusivement sur ce que la défenderesse est encore propriétaire du terrain dont le bornage lui est demandé. Comme il est admis qu'elle en était propriétaire autrefois, c'était à la demanderesse à prouver qu'elle en a perdu la propriété par l'action des eaux de la rivière, qui l'auraient complètement envahi.

Avant d'examiner cette question, je dois m'occuper d'une objection technique que fait la demanderesse au plaidoyer par lequel la défenderesse soutient que la concession faite à la demanderesse est nulle. Elle prétend que la défenderesse ne pouvait soutenir cette prétention sans attaquer par un *Scire Facias* les lettres patentes par lesquelles la Couronne a concédé le terrain.

Cette prétention me paraît insoutenable. Ce ne sont pas les lettres patentes de la Couronne que la défenderesse attaque, mais l'acquisition par la Couronne de la propriété de ce terrain. Si un particulier vendait ma maison, je pourrais la revendiquer entre les mains de son acheteur qui en serait en possession, et je ne serais pas obligé d'attaquer le contrat de vente en vertu duquel il aurait la possession. La Couronne n'a pas plus le droit qu'un particulier de vendre ce qui ne lui appartient pas. Si elle le fait, elle ne transmet aucun droit de propriété à son acheteur, que la vente se fasse par un acte devant notaire, ou par lettres patentes. La demanderesse invoque une concession par la Couronne. Elle devait prouver que la Couronne était propriétaire de ce qu'elle lui a concédé.

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Il n'en serait pas ainsi pour une terre formant partie du domaine de la Couronne qui n'aurait jamais été concédée, parce que la Couronne est propriétaire de tous les terrains non concédés qui se trouvent dans la province. Mais ici, encore une fois, la demanderesse admet que ce terrain a déjà été concédé par la Couronne et a appartenu à la défenderesse.

J'en viens maintenant au fond du litige. La défenderesse avait-elle perdu la propriété de son terrain, lorsque le gouvernement en a fait la concession à la demanderesse ? Pour cela il aurait fallu que ce terrain eût été, suivant l'expression des auteurs, définitivement conquis par les eaux de la rivière. La demanderesse a-t-elle prouvé cette conquête définitive des eaux ? Pour cela il lui aurait fallu établir, non seulement que par des éboulements successifs l'eau avait envahi ce terrain, mais que la défenderesse avait renoncé à combattre ces envahissements et à se défendre contre eux. La demanderesse a-t-elle fait cette preuve ? La négative ne me paraît pas douteuse. Les témoins nous disent que chaque année, pendant plusieurs années, il se faisait des éboulements qui enlevaient environ six pieds du terrain de la défenderesse, et même un terrain réservé pour une rue dans la concession primitive des terres à cet endroit. Mais il est également prouvé qu'à la place du terrain éboulé il a été construit des quais qui empêchent l'eau de couvrir le terrain, et qui permettent de s'en servir.

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La demanderesse admet l'existence de ces quais, mais elle dit, d'abord, que ce n'est pas la défenderesse qui les a construits, et, ensuite, qu'ils n'ont pas été construits dans le but de protéger le terrain de la défenderesse contre l'envahissement des eaux, mais qu'ils sont formés par les rebuts provenant du moulin des messieurs Price, lesquels rebuts, en venant s'échouer là, ont comblé le terrain à l'endroit où l'eau l'avait fait baisser assez pour qu'il fut recouvert à mer haute.

La preuve n'établit pas que ce quai ait été ainsi formé par le hasard. La maison Price ayant obtenu de la défenderesse la permission de passer sur son terrain, a fait ces quais pour le protéger et pour continuer de s'en servir.

Mais, même si la formation de ce remblai ou quai était due au hasard, je ne vois pas la différence que cela ferait dans la cause actuelle. Il s'agit, encore une fois, de savoir si le terrain de la défenderesse a été perdu pour elle et acquis par la Couronne, parce qu'il a été définitivement conquis par les eaux de la rivière. S'il n'a pas été ainsi conquis, peu importe que ce soit par des travaux de protection faits par la défenderesse elle-même, ou par des travaux exécutés par les messieurs Price, ou par le travail de la nature. L'effet est le même dans les trois cas : le terrain n'a pas été définitivement conquis par les eaux, et alors, la défenderesse en a conservé la propriété, la Couronne n'y a donc acquis aucun droit.

La défenderesse étant, à mon avis, propriétaire du terrain qu'on lui demande de borner, il ne peut être question d'action en bornage.

Comme le terrain n'appartenait pas à la Couronne lorsqu'elle l'a concédé, il est inutile d'examiner la question de savoir si, en supposant qu'il lui eût appartenu, la concession devrait être faite par le gouvernement de la province ou par le gouvernement du Canada.

Je suis d'avis de confirmer avec dépens le jugement de la Cour de Chicoutimi.

CASAULT J. EN CH.—J'ajouterai à l'opinion que vient d'exprimer mon savant collègue, la citation des autorités qui suivent :

Proudhon — Rep. V. Eaux, Vol. 4, p. 85, No 1268.

Dalloz — Rep. V. Eaux, No 84.

Dalloz — Supplément, Eaux, No 59.

Gaudry — Rivières navigables et flottables, Vol. 1, No 23.

Lefebvre de la Plouche — Traité du domaine, Liv. 1, chap. 2, p. 13, écrit même que le propriétaire dont partie de la propriété a été envahie par les eaux peut la revendiquer, tant que la preuve de la propriété antérieure peut se faire ; mais Gaudry suscit, au Vol. 1, No 93, ne fait durer ce droit que trente ans, et je crois que cette doctrine est la plus conforme aux principes.

1, Fuzier-Herman, Nos 199 à 204.

A ce dernier numéro, l'auteur cite un arrêt du tribunal d'appel de Caen, qui a décidé que l'Etat n'a pas pu, même à l'époque où ce terrain était réputé rivage de la mer, en faire, au préjudice du propriétaire, la concession à des tiers.

Belleau, Belleau & Belleau, pour la demanderesse.

L. G. Belley, pour la défenderesse.

G. G. Stuart, C. R., conseil.

SUPERIOR COURT.

QUEBEC, December 20th 1906.

Present :—McCORKILL, J.

GAGNON v. DELISLE.

Procedure—Possessory actions—Possession by plaintiff—Title affording presumption of possession—Registration—Renewal of registration after cadastre made—Subsequent purchaser—Delay within which action en complainte must be brought.

HELD :—1o. Possession on which to ground a possessory action (*possession utile*) will not be inferred from a title to a real right registered before the making of the cadastre in the locality where the immovable affected

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is situate and of which the registration has not been renewed, as against the purchaser of the immovable, free from the incumbrance, by a title registered subsequently to the making of the cadastre.

2. No possessory action *en complainte* will lie for acts of disturbance committed more than a year before it is brought.

McCORKILL, J. :—

The plaintiff sues the defendant *en complainte*. He alleges that he is the owner and possessor of a wood-cut (*coupe de bois*) on a piece of land in the Fief Maheu, in the parish of St Augustin, in the county of Portneuf, of which the defendant is the owner, and which forms part of cadastral lot 294; that the defendant disturbs him in his possession; that in November 1902, he first surprised the defendant cutting his wood, and, as he objected, the defendant promised not to disturb him again; that again, in the autumn of 1903, November 1905, and about the 6th or 7th June 1906, the defendant cut wood on the lot without permission; on the latter occasion the plaintiff's son caught the defendant's son drawing the wood; that during the past four or five years, the defendant has cut and cleared, at the northern extremity of the wood lot, one half arpent by two arpents, illegally and without permission, which he now cultivates; that he built a fence, 1000 to 1200 feet in length, out of the plaintiff's wood; that the plaintiff cannot tolerate this longer and would risk losing his right to and possession of the cut of wood on this lot, if he did not appeal to the Court for ratification of his right and to have the defendant enjoined from further troubling him in his possession; he estimates the damage caused to him by the defendant at \$100 and he concludes accordingly.

The defendant admits the deeds upon which the plaintiff bases his title to the wood-cut, denies the other allegations and alleges that he acquired the property, upon which the plaintiff claims the cut of wood, on the 31st December 1895, by deed from Hon. F. X. P. Larue, who had owned it for many years; that he cut wood in 1898 on the lot, but as the plaintiff claimed the wood, he left it there; that the fence was made to keep his cattle on the cleared portion, out of "abattis"

which was of no value to the plaintiff, who had no rights in it ; that he cut some small wood to clear his land (*faire du découvert*), which had no commercial value ; all claims which the plaintiff might have had are prescribed ; the plaintiff cut all the commercial wood off the lot and his right has been exhausted (*épuisé*) ; that according to the usage and custom of the locality the right to the cut of wood on a lot comprises only commercial wood, which ceases once the wood is cut off ; that the plaintiff sold the cut of wood on the part of the lot where the defendant cut wood ; and concludes for the dismissal of the action.

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The plaintiff admits the defendant's title from the Hon. F. X. P. Larue, to the land, but claims the exclusive title to the wood ; that each bought the cut of wood on part of the lot.

Article 1064 Code of Civil Procedure accords a possessory action to the possessor of an immovable or real right, other than a farmer on shares or a holder by sufferance, who is disturbed in his possession ; provided (Art. 1065) suit is brought within a year from the disturbance. To sustain his action the plaintiff's possession must be of a real right (for he admits the defendant owned the *fonds* or soil) and the defendant must have disturbed him within a year of the date the action was served.

The titles are not at all complete. The defendant bought the whole of cadastral lot 294, without any reserve of the cut of wood on any portion of it, by deed passed 31st December 1895, since which time he has possessed the property and used it in his farming operations.

Three years after he bought it, in 1898 or 1899, he felled a spruce and cut two logs out of it. The plaintiff appeared on the scene and objected to him cutting his wood, claiming the exclusive right to cut wood, where the spruce had been cut. The defendant had known of the right which the plaintiff and his father had held, for he asked Mr Larue about it, when he bought lot 294, and was told the right had been exhausted, in other words, that the wood had been cut off and that, having once exercised the right, it became extinct.

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It is declared in the defendant's deed that his *auteur*, Mr Larue, acquired part of this lot 294 on the 6th January 1886, and the balance on the 3rd December 1895, by duly registered deed, all from parties who were the vendors mentioned in both deeds.

The plaintiff invokes two deeds, one from Louis Cantin to Charles Gagnon, father of the plaintiff, dated the 5th November 1878, of the *fonds* of the lot in question, which is admitted to have been part of what in the defendant's deed from Larue is described as cadastral number 294 ; he already owned the cut of wood on the lot. Charles Gagnon therefore became owner of the land and what was on it.

The second deed, which the plaintiff invokes, is a deed of sale from Charles Gagnon and his wife, dated the 24th February 1879, of "*la coupe de bois*" of the lot in question, being four arpents two perches by twenty arpents in depth. In this deed, it appears that Charles Gagnon had inherited this cut of wood by the wills and testaments of his father and mother. But it does not appear that this deed was ever registered. How the land (*le fonds*) passed from Gagnon to Larue does not appear, but, as it is admitted by the answer to the plea that the defendant acquired the ownership of lot 294 from Larue, by the deed which he invoked, there must have been one or more intermediary sales between Charles Gagnon's ownership and the immediate *auteurs* of Larue, mentioned in the deed to the defendant.

Another matter, which cannot be overlooked, is that the deed to the defendant admitted by the plaintiff, is of cadastral lot 294 ; this parish therefore, of St Augustin, must have come under the provisions of C. C. 2168, 2172-3. Now, it is quite evident that Larue and the defendant were subsequent purchasers, contemplated in C. C. 2173, and the plaintiff's real right, if such it was, with respect to the defendant, has lapsed, for it does not appear that either the deed of sale to him or a renewal were ever registered.

Now, was this a real right ? Has the plaintiff proved it to be a right as against the land and whoever is its owner ?

"Droits réels ce sont ceux qui affectent les biens des débiteurs d'une manière tellement particulière qu'ils donnent à ceux auxquels ils sont acquis, la faculté de les exercer, en quelques mains que ces biens soient passés."

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4 R. de J. 134/6-8. "Les droits réels ne sont pas autre chose qu'une partie, accordée à un tiers, des droits dont la réunion forme la propriété parfaite. Ils n'en sont qu'un démembrement. Idem 22. Tels sont les droits de servitude."

Servitudes may be personal as well as real.

C. C. 545 says: "Every proprietor having the use of his rights and being competent to dispose of his immovables, may establish over or in favor of such immovables, such servitudes as he may think proper, provided they are in no way contrary to public order."

The corresponding article of the C. N. (686) contains a clause which does not exist in our law: "pourvu néanmoins que les services établis ne soient imposés à la personne, ni en faveur de la personne, mais seulement à un fonds et pour un fonds", and commentaries on the Code Napoléon are therefore in many cases misleading.

Our jurisprudence as laid down in *Croteau vs Quintal* (1) and in *Watson vs Perkins* (2) clearly establishes the right to the standing timber or wood (*la coupe de bois*) on a lot of land belonging to another, as a personal servitude, and therefore a real right, which is preserved, as against a subsequent purchaser and owner of the land, by registration and by renewal, after the provisions of C. C. 2168 have come into force in the municipality.

That an official plan and book of reference has been put into force in the parish of St Augustin is sufficiently established by the extract produced by the plaintiff, as his exhibit P1, and by the evidence of the witness Croteau, Provincial Land Surveyor, who made and certified the extract.

(1) 1 L. C. J. 14

(2) 2 L. C. J. 261

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The plaintiff says that in virtue of the deed to him from Charles Gagnon, he is the sole and veritable owner of the cut of wood (*coupe de bois*) on the lot in question and which is shown by the plan produced by himself to be a part of cadastral lot 294. The defendant denies this and it is for the plaintiff to substantiate his claim. Clearly, to preserve the plaintiff's right to the cut of wood, as against the defendant who was not a party to the deed by which he acquired it, but was a subsequent purchaser, he must have registered a renewal of his right under C. C. 2172 ; and to maintain an action *en complainte* or *confessoire* he must have proved that the right was renewed, which he has not done.

But, had he established such renewal, I do not think his action was otherwise well founded. He sets forth four distinct acts of disturbance in his declaration, viz : in November 1902, in the autumn of 1903, in November 1905, and about the 6th or 7th June 1906, and a general allegation of cutting and clearing an acre of the northern part of the wood lot, during the past four or five years.

Art. 1065, Code of Civil Procedure, requires that possessory actions must be brought within a year of the disturbance. The action was served on the 7th July last (1906). The acts of disturbance committed prior to 7th July 1905 are useful only in establishing that the defendant was really disturbing the plaintiff in his possession, for it has been held ; and I think rightly and reasonably so, that a single act might not be considered a disturbance, within the intent and spirit and meaning of the law.

First then we will consider the act of the 6th or 7th of June 1905.

The only witness, who gave evidence in support of the charge, was the plaintiff's son, a boy of ten years, a bright and intelligent lad. He swore that the defendant's son, about the middle of June 1905, drew some wood from the wood lot :—

“ Q.—L'année dernière, te souviens-tu que tu es allé sur la terre de ton père ?

" R.—Oui, monsieur.

" Q.—A quelle date ?

" R.—Vers le milieu du mois de juin.

.... " Q.—Qu'est-ce qu'il faisait ?

" R.—Il ramassait du bois.

" Q.—Où ?

" R.—Au bord du bois.....

" Où le mettait-il ?

" R.—Dans la voiture."

and he continues that he drew it in the direction of the house. He says the wood was as large as his wrist and as the cart or waggon. It was about the middle of June "de l'année dernière" (1905) that the lad saw this. The writ issued in this case on the 30th June 1906 and was returned into Court on the 13th July last. The bailiff who served the writ, certified that he served it on defendant on the 7th June, which I assume to be a clerical error.

Evidently the defendant's plea of prescription applies to this alleged act of disturbance, for the action was not brought within a year of the disturbance.

But, in any event, I do not consider the plaintiff has satisfactorily proved this was an act of which he had any right to complain. This so called wood lot was a swamp or marsh (*une savane*) from which the first cut of wood is proved to have been made fifty years ago.

After the cut had taken place, there was only a second growth on the lot and it must have been exceedingly small. Being "*une savane*", or marsh land, the growth has been very slow.

A part of lot 294 is in meadows bordering on some woods. It was here the plaintiff's son saw the defendant's son loading the trees "gros comme le poignet." The defendant's son swears this wood was cut along the edge of the wood, but on the first plowed ridge (*planche*) of the meadow. Other witnesses swear they saw wood had been cut off a strip which had formerly been plowed, sowed and turned into hay land and formed part of the meadow ; that it had been neglected,

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improperly farmed and young saplings and underbrush had grown on it. This being so, it was clearly the defendant's right to cut it off.

There is no proof of any subsequent act of disturbance and it is unnecessary therefore to consider anterior acts.

Clearly the plaintiff's right to a possessory action had become prescribed.

At the trial the plaintiff seemed to place some importance on alleged admissions of guilt and offers of settlement by the defendant. There is not an allegation of the declaration on which to found proof of such admissions and promises: the evidence was admitted under reserve of objections, which objections are maintained. But, in any event, the proof of such admissions is not at all satisfactory or convincing; and, in the face of the defendant's unqualified denial of an admission of guilt or promise to pay, I hold there was no such promise.

There is proof abundant that the defendant was a very peaceable citizen who dreaded litigation and law costs, who, rather than come to Court, would have paid something, who was no doubt more or less alarmed by a letter from the plaintiff's attorneys (which ought never to have contained the clause suggesting possible criminal proceedings) who tried to have the matter settled *à l'amiable* by arbitration, and there is abundant evidence that the plaintiff was the owner of a *coupe de bois* on the defendant's land, which was of no practical value, which he had held for nearly thirty years, which respectable witnesses, neighbors of the parties, swear had not measurably improved to their knowledge in twenty or twenty-two years, and upon which he objected that the owner of the land should cut brush for a fence to keep his cattle within bounds. The plaintiff would not listen to the defendant and his companions, Couture and Coté, when they went to see him to have the pretended disturbances settled *à l'amiable*. The plaintiff was not in an amiable mood; in fact he was in a quarrelsome litigious mood. To their appeals, he replied: "Mon parti est pris; c'est la cour qui va décider l'affaire." I have given a good

deal of study and attention to this case, and I cannot find one single reason to justify the plaintiff's action. I think a mass of unnecessary evidence was adduced in the case, more particularly in the useless repetition of the same question sometimes in a vain endeavor to get the witnesses to admit that saplings, brush, &c. *des halliers, des bluets, rien que de petites saloperies* might be used as firewood and therefore was of some value. Witness after witness swore that the best of it was not worth the value of the time and trouble of cutting it.

Under all these circumstances, I hold the plaintiff's action unfounded and it is dismissed with costs.

Jules Patry, for the plaintiff.

Tuschereau, Roy, Cannon & Parent, for the defendant.

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SUPERIOR COURT.

QUEBEC, December 12th 1906.

Present :—McCORKILL, J.

DAIGLE v. DUSSAULT.

Procedure—Attachment before judgment—Grounds of recourse to the process.

HELD :—A statement made *ab irato* by a party of affluent means that he will within twenty-four hours sell all the property he has and go to the States affords of itself no sufficient ground for proceeding against him by attachment before judgment.

McCORKILL, J. :—

The principal action in this case is for \$10,000.00 damages, alleged to have been caused by the defendant to the plaintiff for reasons which need not be mentioned here.

As an incident to the action, the plaintiff caused a *saisie-arrêt* before judgment *en mains tierces* to issue.

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The case comes before the Court at the present time upon a petition to quash the seizure.

The affidavit upon which the writ of attachment issued was made by the plaintiff, who alleges, among other things, in effect : that the defendant is about to leave the Province of Quebec with the intention to defraud his creditors in general and the plaintiff in particular and that she would be deprived of all recourse against him ; that the defendant is secreting and making away with, and is about to secrete and make away with, his property, with the intention of defrauding his creditors in general and the plaintiff in particular : that without recourse to a writ of *saisie-arrest* before judgment, to seize in the hands of the garnishee's property, belonging to the defendant, she would be deprived of her recourse.

The defendant petitioned to quash this seizure upon its merits, upon the ground that the essential allegations of the affidavit were false.

The *onus* of proof is upon the plaintiff to justify the issue of this writ.

It appears from the evidence that, at the time the plaintiff caused her action for \$10,000 to issue against the defendant, two other actions had been taken against him by parties who appeared as the principal witnesses, in support of the plaintiff's seizure in present case. One of the parties, Alfred Tanguay, sued the defendant for \$2,500 and the other witness, Gosselin, sued him for \$582.50, and both employed the Counsel for the plaintiff in this cause.

These actions were all pending on the 24th day of July 1906.

These witnesses were old acquaintances of the defendant : one of them, Tanguay, had unsuccessfully sued the defendant upon the same claim several years ago.

The evidence discloses rather an extraordinary condition of affairs. Tanguay has an office in Bridge street. He says that on the 24th of July last, he received a telephone message from the defendant, who asked him for an interview at his office on the afternoon of that day. The telephone, at which Tanguay received the message was within sight of the

bar of the hotel Belleville and—extraordinary coincidence—Napoléon Aulin was at the bar at the time, having a drink. Half past three was the hour fixed for the interview, and Tanguay asked Aulin to be present. Gosselin swears that on the same day, the 24th July, the defendant telephoned him to meet him at Tanguay's office at 3.30 and of course he did so.

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Tanguay, Gosselin and Aulin all swear that the defendant and they met at the hour fixed; that at this interview, the defendant proposed that Tanguay and Gosselin should use their influence with the plaintiff in this case, to have her action of damages settled, and offered to pay her \$500 and also to pay Tanguay and Gosselin each \$500 in settlement of their actions, if they succeeded in obtaining a settlement of the plaintiff's case. Thereupon, Tanguay proposed that they would proceed to the office of Mr Lane, attorney for the plaintiff. They say this seemed to anger the defendant very much; he got up and declared he would not go to Mr Lane's office, and that he would, within twenty-four hours, sell all the property he had and go to the States; and he thereupon left Tanguay's office. They say the interview lasted from five to ten minutes.

On the 27th of July, the plaintiff caused the seizure in question to issue.

And on the 11th of August, Tanguay had the defendant arrested under a writ of *capias*, as an incident in his action.

The plaintiff examined certain witnesses in corroboration of the evidence of Tanguay, Gosselin and Aulin, as to the presence of the defendant on Bridge street, on the 24th of June.

The proprietor of the hotel Belleville swears he called Tanguay to the telephone on the morning of the 24th,—(He understood from Tanguay's replies at the telephone that a rendez-vous was being made at his office that afternoon)—that in the afternoon at about 2 o'clock he went across to Papillon's barber shop to get a shave, and that, while standing outside, before entering the shop, the defendant drove, in a covered buggy, past Tanguay's office several times, and each

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time he passed, he looked in the direction of Tanguay's office. He did not know him at the time, but he was told by Aulin who he was, and he recognized him in Court. This was six or seven days after Tanguay took his action against the defendant, of which he had knowledge. In cross-examination this witness swears the buggy was driven backwards and forwards for two hours and a half to his knowledge, *as he stood on the street for that time*. When he went into the barber shop they were still there, but when he came out they were gone.

Papillon, the barber, says he knew Tanguay ; that one afternoon when standing in front of his shop talking with Belleville and Aulin, the defendant drove past in his buggy ; it was about two p. m., when he first saw him and he last saw him at three p. m., when he went into his shop ; that the defendant looked towards Tanguay's office each time he passed ; he did not know who he was but Aulin told him. He identified the defendant in Court and swore it was ten or twelve days after Tanguay had taken his suit against the defendant. He left his shop for the afternoon, at four o'clock. He is quite sure the defendant was *alone* in his buggy. In cross-examination, this witness swears that he is quite certain that the other witness Belleville *was not in his shop at four p. m.* In this respect he contradicts the evidence of Belleville, who swore that he entered the barber shop at half past four. Papillon further swears that the horse was a bay mare and the buggy was covered. He says that the defendant, each time he passed, looked towards Tanguay's office.

It seems most extraordinary that the defendant should have been driving in Bridge street at 2 p. m. and have continued driving back and forth in the vicinity of Tanguay's office continuously, for 2½ hours ; and more extraordinary still that, during that interval, he should have entered Tanguay's office at 3.30, remained from five to ten minutes, gone out and continued to drive on Bridge street until 4.30 when Belleville entered the barber shop.

Aulin swears that after the interview in Tanguay's office,

he went immediately, of his own accord, and notified the plaintiff.

Before reviewing the evidence of the defence, it would be well to observe that Tanguay's action was founded on the same causes as a previous action, which had been dismissed ; that Gosselin's action is founded upon a deposit of money, alleged to have been made in the hands of Dussault, many years before, and which he failed to return or account for ; that Aulin, according to the evidence of Gosselin is the principal backer of the plaintiff in this cause. They were all interested in obtaining money from the defendant interested that judgment should be in favor of the plaintiff in this case.

The defendant avers in his pleadings that the plaintiff's principal action and the incidental seizure are being used by these parties for the purpose of forcing him to pay them various sums of money.

Another fact, worthy of notice is that while the above three witnesses swore that the defendant said, at the interview of the 24th July, he would sell out, and realize upon his property and leave for the United States, within twenty-four hours yet the plaintiff only took her seizure on the 27th July and the witness, Tanguay, only took his *capias* on the 11th of August. The defendant argued, through Counsel, that these facts showed that neither the plaintiff nor her friends really believed that the defendant intended to abscond or to secrete his property. My experience was that creditors lost not a moment in issuing a *capias* or *mainie-arrêt*, if they really feared their debtor intended to abscond or secrete his property.

The defendant examined several witnesses.

Details of the property which the defendant owned were given and it was clearly established that he held in real estate, mortgages and securities of various kinds, property of the value of sixty-five to seventy thousand dollars ; that he was a bachelor ; that he lived with his mother, without cost ; she was a widow, an elderly lady who enjoyed the usufruct of property, in which the defendant held proprietary rights.

Several intimate friends of the defendant testified that he

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did nothing at that time to indicate that he had any intention whatever of leaving Quebec, or of disposing of his property.

The defendant submitted evidence in contradiction of the various witnesses, who testified that he went to Tanguay's office or was on Bridge street on the afternoon of the 24th July. It appears from their evidence that the defendant is the owner of a spirited horse which, unlike the famous steed which David Harum sold to the credulous Deacon, could never be trusted "to stand without hitching" or rather, I should say, without attendance ; this horse was boarded at the livery stables of A. H. Hall ; on the afternoon of the 24th at a little before *three o'clock*, the defendant was at the livery stable for his horse, which was hitched to an *open* buggy ; he gave instructions that his Stanhope buggy, which Doctor Hall and his employees, swore was on the third story of the livery building, should be got ready for the afternoon of the 26th, as he intended going to Pointe-aux-Trembles ; that the defendant drove away about three o'clock, and did not return until 5.30.

Mr Hudon, brother-in-law of the defendant, swears that the defendant drove to his house ; that he got in with him in his carriage and that they drove together until 5.30 ending their drive at the livery stable ; that from 3 o'clock to 5.30 he was continuously with the defendant and that they never drove on Bridge street. It is not necessary here to detail the various roads on which they drove.

Other witnesses are examined, tending to corroborate this evidence and specially to bring out the fact that the horse was never left without an attendant.

Upon this evidence, the plaintiff asks that the seizure be maintained and the defendant asks that it be quashed.

The Court is asked to declare, upon the evidence of the three witnesses, Gosselin, Tanguay and Aulin (one of whom has capiased the defendant, all of whom are interested in the result of this case), uncorroborated by any evidence to show that the defendant intended putting his threat into execution ;

that the defendant, a man worth from sixty to seventy thousand dollars, who owed no debts whatever (and therefore could not have defrauded any creditors in general), was about to sever the connections of his whole life and seek a residence in a foreign land, all because Tanguay or Gosselin proposed that he should go to Mr Lane's office, for the purpose of negotiating a settlement of the principal action.

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After carefully considering the entire evidence adduced in the case, I have come to the conclusion that the plaintiff has failed to prove that the defendant had the intention of absconding or of secreting and making away with his property ; more than that, I am of opinion that the mere fact that the defendant declared in Tanguay's office (supposing him to have done so in a spirit of anger, as is sworn to by the plaintiff's witnesses) that he would realize upon his property and go to the States within twenty-four hours, is not in itself sufficient to warrant this Court in maintaining the plaintiff's seizure. It was incredible upon its face. It is insufficient in law.

This is not the first time that our courts have been called upon to say whether or not a declaration of this kind is sufficient to warrant the issue of a *capias* or a seizure before judgment. In the case of *Walker vs Goldman* ⁽¹⁾, it was held that the defendant, who had been sued in damages for breach of promise of marriage, and who said to the plaintiff that he would go to the United States to be rid of her, if she insisted that he should marry her within the delays agreed upon, was not sufficient to warrant the issue of a *capias* against him, if *no other evidence was adduced to show that he intended putting his threat into execution and to defraud the plaintiff.*

I quite agree with the holding in that case.

Even if the defendant had gone to Tanguay's office and if the interview, as narrated by the three interested witnesses I have referred to, were true (and I do not think it was), it

(1) 16 S. C. 466.

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would not, in my opinion, necessarily imply that he intended to, or that the plaintiff had any reasonable cause to believe that he intended to carry his threat into execution.

These three witnesses all knew that the defendant was in very comfortable circumstances, that he had no creditors ; they made no enquiries to ascertain if he was making any attempt to dispose of his property.

Upon the whole, I am of opinion that the plaintiff's seizure issued illegally and without any just cause ; that the plaintiff has failed to prove the essential allegations of her affidavit.

The prayer of the petition is therefore granted and the writ of *saisie-arrest* before judgment is quashed with costs.

Lane & Cantin, for the plaintiff.

Casgrain, Lavery, Rivard & Chauveau, for the defendant.

L. P. Pelletier, K. C., Counsel.

COUR SUPÉRIEURE.

QUÉBEC, 22 décembre 1906.

Présent :—LANGELIER, J.

MARCOTTE v. BOLDUC.

Responsabilité—Diffamation—Diffamation dans les journaux—Droit qui s'y applique—Moyens de défense.

JUGÉ :—1o. C'est le droit anglais, en vertu duquel la liberté constitutionnelle de la presse existe au Canada, qui s'applique aux actions pour diffamation dans les journaux et aux défenses fondées sur l'immunité (*privilege*) ou la critique légitime (*fair comment*).

2o. Sous l'empire de ce droit, le concours de trois éléments est nécessaire pour soustraire l'auteur d'un écrit diffamatoire à la responsabilité civile : 1o il faut que l'écrit soit vrai ; 2o qu'il porte sur des faits qui intéressent le public, et 3o qu'il ait été publié pour servir l'intérêt public et sans mauvaise intention (*malice*).

LANGELIER, J. :—

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Le demandeur et le défendeur sont tous deux des médecins pratiquant en la paroisse de St Michel, dans le comté de Bellechasse.

Le demandeur a poursuivi le défendeur en dommages pour \$5,000 pour diverses diffamations, mais, entr'autres, pour des diffamations contenues dans deux correspondances que le défendeur a publiées dans le journal appelé "Le Peuple", publié à Montmagny.

Le défendeur admet avoir écrit et publié ces correspondances, mais plaide que les faits qui y sont mentionnés étaient vrais ; que ces faits intéressaient le public, et qu'il les a publiés dans l'intérêt public ; qu'ils constituaient seulement une critique légitime et faite de bonne foi des actes du conseil de la paroisse de St Michel.

Dans les deux correspondances dont il s'agit, le demandeur est accusé, en résumé, d'avoir, soit par sa négligence, soit par son incapacité comme médecin, été la cause que vingt-cinq personnes sont mortes de la diphtérie dans la paroisse de St Michel.

Ces correspondances paraissent surtout viser le conseil et le maire de la paroisse, mais elles atteignent le demandeur, et le défendeur, entendu comme témoin, a admis qu'elles le visaient aussi. Ces accusations ne sont, au fond, que la répétition de celles qu'il avait portées contre le demandeur à une séance du conseil tenue en 1903.

Comme on le voit, il était impossible de porter contre le demandeur des accusations plus graves que celles-là.

La première question que j'ai à examiner est celle de savoir si les faits imputés au demandeur étaient vrais. La preuve établit que les plus importants étaient faux. Il n'y a pas l'ombre d'une preuve au dossier que le demandeur ait été cause qu'une seule personne soit morte de la diphtérie par sa négligence ou son incompétence. Il est établi qu'il n'a pas même soigné l'une de celles dont la mort lui était attribuée, et que l'une d'elles, un M. Bélanger, qui est réellement décédé,

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n'est pas mort de la diphtérie, mais d'une inflammation de poumons. Quant à celles qu'il a soignées, il est prouvé qu'il a pris toutes les précautions exigées par les lois de la médecine et de l'hygiène.

Mais, même si les faits imputés au demandeur étaient vrais, je n'ai pas besoin de dire que cela ne suffirait pas pour justifier le défendeur de les avoir publiés. Il faudrait d'abord que l'intérêt public demandât leur publication, ou que cette publication fût utile au public. Or, quelle utilité publique pouvait-il y avoir à ressasser en 1905 l'histoire d'une épidémie de diphtérie qui avait cessé depuis deux ans ?

Il n'y avait donc aucun intérêt public à publier les faits dont le défendeur a accusé le demandeur. Mais, même si ces faits pouvaient intéresser le public, cela ne suffirait pas pour justifier le défendeur de les avoir publiés. Il faudrait qu'il les eût publiés uniquement pour servir le public, et non pas dans le but de satisfaire sa malice ou sa vengeance.

Bien que le droit qui régit l'action d'injure soit le droit français et non le droit anglais, c'est au droit anglais qu'il nous faut recourir lorsqu'il s'agit de justifier une diffamation qui a été commise dans un article de journal. La liberté de la presse était inconnue dans l'ancien droit français, mais elle est consacrée par notre droit public actuel, qui est le droit anglais. C'est donc dans ce droit qu'il faut chercher les règles qui limitent la liberté de la presse en matière de diffamation. Ce droit permet de publier dans les journaux tous les faits quelque dommageables qu'ils soient pour quelqu'un, qu'il peut être dans l'intérêt public de faire connaître, mais c'est à condition qu'ils soient publiés exclusivement dans le but d'être utile au public, et non pas dans le but de satisfaire la vengeance ou la malice de celui qui les publie. Cela a été décidé dans les causes suivantes :

Campbell vs Spottiswoode ⁽¹⁾, jugée en 1863. *Henwood vs Harrison* ⁽²⁾, jugée en 1872. *Merivale vs Carson* ⁽³⁾, jugée

(1) 3 B. & S. 769.

(2) L. R. 7 C. P. 606.

(3) 20 Q. B. D. 275.

en 1887. *Thomas vs Bradbury* (1), jugée le 25 juin 1906. Dans cette dernière cause, il s'agissait d'une action en dommages intentée par l'auteur d'un livre que le défendeur Lucy avait critiqué dans le *Punch* de Londres. Le demandeur prétendait que cette critique était injuste et faite par malice contre lui. Le défendeur plaida ce qu'on appelle vulgairement le plaidoyer de *fuir comment*, c'est-à-dire, de critique légitime. A l'enquête, le demandeur ayant voulu prouver que le défendeur avait de l'animosité contre lui, dans le but de montrer qu'il avait publié sa critique par malice, le défendeur s'y est opposé, disant que du moment qu'il n'avait fait que traiter un sujet d'intérêt public, on n'avait pas à s'enquérir des motifs qui l'avaient induit à écrire.

Le juge qui présidait la cour a décidé contre lui, et a permis cette preuve. Le jury a rendu un verdict de 300 livres sterling de dommages, et le juge a rendu jugement suivant ce verdict. Les défendeurs ont porté ce jugement-là en appel, mais il a été unanimement confirmé par la Cour d'Appel. Les juges qui composaient la Cour d'Appel Collins, Master of the Rolls, Cozens-Hardy and Sir Gorell Barnes, ont tous trois exprimé l'opinion que, pour échapper à une condamnation en dommages à raison de la publication d'un article diffamatoire, il ne suffit pas que l'auteur de l'article prouve que les faits qu'il a publiés intéressaient le public, mais il faut qu'il établisse qu'il les a publiés en vue de servir le public.

Voici comment s'est exprimé le Master of the Rolls Collins: "Their point" (la prétention des avocats du défendeur) "was " that if the article itself, apart from the extrinsic evidence, " did not raise a case for the jury that the bounds of fair " comment had been overstepped, proof of actual malice on " the part of the writer could not affect the question or dis- " turb his immunity. This is a formidable contention. It " involves the assertion that fair comment is absolute, not

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(1) (1906) 2 K. B. 627.

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“ relative, and must be measured by an abstract standard ;
 “ that it is a thing quite apart from the opinions and motives
 “ of its author and his personal relations towards the writer
 “ of the thing criticized. It involves the position also that
 “ an action based on a criticism is wholly outside the ordi-
 “ nary law of libel, of which malice express or implied, has
 “ always been considered to be the gist”

“ He (l’auteur de l’article) and he only, is the person in
 “ whose motives the plaintiff in the libel action is concerned,
 “ and if he, the person sued, is proved to have allowed his
 “ view to be distorted by malice, it is quite immaterial that
 “ somebody else might, without malice, have written an equally
 “ damnatory criticism. The defendant, and not that other
 “ person, is the party sued. This seems to me quite clear in
 “ point of principle

“ Proof of malice may take a criticism *prima facie* fair
 “ outside the right of fair comment just as it takes a commu-
 “ nication *prima facie* privileged outside the privilege. The
 “ particular allegation which was unprotected in *Merivale v.*
 “ *Carson* was never within the *right* when the facts were
 “ ascertained by the jury in interpreting the passage impug-
 “ ned. Proof of *bona fide* belief was therefore irrelevant ;
 “ nothing but proof of the truth could justify the allegation.
 “ If the analysis be strictly carried out it will be found that
 “ the two rights whatever name they are called by, are
 “ governed by precisely the same rules. The only practical
 “ difference is that in an action based on a criticism of a
 “ published work the transaction begins by the admission on
 “ the part of the plaintiff, implied from the averment by him
 “ of publication of the work criticized, that the comment
 “ came into existence on a protected occasion.

“ There is not even any decision that the word privilege,
 “ as used in *Henwood v. Harrison* to which Lord Esher was
 “ himself a party, is not as good a word as any substitute
 “ that can be suggested to express the right by which, in
 “ certain circumstances, writings defamatory of another per-
 “ son may be published with impunity, because the presump-

"tion of malice is negatived. For the reasons I have given
 "the difference is one of words only, and could not be a
 "matter of legal decision."

"In *Merivale v. Carson* itself, Lord Esher, M. R. deals with
 "the question. He says : "It is said that if in some other case
 "the alleged libel would not be beyond the limits of fair criticism and it could be shewn that the defendant was not
 "really criticizing the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still
 "the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the
 "comment would not then really be a criticism of the work.
 "The mind of the writer would not be that of a critic, but
 "he would be actuated by an intention to injure the author."

"But in a very recent case in this Court, the point is actually decided: *Plymouth Mutual Co-operative and Industrial Society v. Traders Publishing Association* (1) "The
 "question there was whether an interrogatory addressed to
 "the state of mind of the defendant, who had pleaded fair
 "comment in an action of libel, was admissible. The Court
 "decided that it was following a previous decision of this
 "Court in a case of privilege strictly so called." Vaughan Williams, L. J. referring to *White & Co. v. Credit Reform Association and Credit Index* (2) says at page 413 of the report : "It seems to me that that case shews that an interrogatory of this kind is just as relevant and admissible in
 "a case where the defence is fair comment as in one where it
 "is privilege. In either case the question raised is really
 "as to the state of mind of the defendant when he published the alleged libel, the question being in the one case
 "whether he published it in the spirit of malice, in the other
 "whether he published it in the spirit of unfairness. In either
 "case, I think such interrogatory as the one now in question
 "is admissible." Fletcher Moulton, L. J. says at page 418

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(2) 1 K. B. 653

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of the report : " I am clear that, both in cases in which
 " the defence of privilege and in those in which the defence
 " of fair comment is set up, the state of mind of the defendant
 " when he published the alleged libel is a matter directly in
 " issue."

" It is, of course, possible for a person to have a spite against
 " another and yet to bring a perfectly dispassionate judgment
 " to bear upon his literary merits ; but, given the existence of
 " malice, it must be for the jury to say whether it has warped
 " his judgment. Comment distorted by malice cannot in my
 " opinion be fair on the part of the person who makes it. I am
 " of opinion, therefore, that evidence of malice actuating the
 " defendant was admissible, and that the learned judge was
 " right in letting the evidence in this case go to the jury."

Le défendeur a-t-il publié les correspondances dont se
 plaint le demandeur exclusivement dans le but de servir l'inté-
 rêt public ? La preuve ne me laisse aucun doute que l'inté-
 rêt public n'était qu'un prétexte, et que la vraie raison pour
 laquelle il a publié ces imputations contre le demandeur
 c'était qu'il lui en voulait pour diverses raisons qu'il est inu-
 tile de mentionner en détail. S'il eût voulu simplement criti-
 quer la conduite du conseil, il pouvait parfaitement le faire
 sans répéter ces vieilles accusations qu'il avait déjà portées
 contre le demandeur à une séance du conseil tenue en 1903.
 Il ne pouvait pas ignorer qu'il n'avait pas le droit de répé-
 ter ces accusations, puisque, poursuivi pour les avoir por-
 tées dans le conseil, il avait payé au demandeur \$50 de
 dommages et les frais de l'action. Il ne peut donc échapper
 à une condamnation.

Bien que le demandeur n'ait pas fait de preuve d'un
 montant bien déterminé de dommages réels, il n'y a pas
 de doute que les accusations que le défendeur a portées con-
 tre lui dans ses correspondances ont dû lui causer beaucoup
 de dommage. Mais n'eût-il souffert aucun dommage réel, il
 a droit d'obtenir des dommages exemplaires. Une condamna-
 tion très sévère ne serait pas déplacée. Dans la cause de Levy
 & Reed, jugée par la Cour Suprême, cette cour a trouvé

qu'une condamnation à \$1,000 de dommages pour des diffamations moins graves que celles dont il s'agit en cette cause n'était pas tellement exagérée qu'un tribunal d'appel pouvait la réduire. Il y a seulement quelques mois, j'ai moi-même condamné le propriétaire du journal "Le Canard" à payer \$300 de dommages pour des diffamations beaucoup moins graves que celles-ci publiées contre un médecin. Mais je tiens compte, dans la cause actuelle, du fait que le défendeur a cru que, du moment que ses accusations intéressaient le public il pouvait les publier, et que les frais sont très élevés, et je ne le condamnerai qu'à \$300 de dommages, avec les dépens de l'action telle qu'intentée.

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Choquette, Gulipect & Francoeur, pour le demandeur.

Casgrain, Lavery, Rivard & Chauveau, pour le défendeur.

SUPERIOR COURT.

MONTREAL, April 14th 1906.

Present :—SAINT-PIERRE, J.

VIGAUD v. DE WERTHEMER.

Principal and agent—Powers of agent—Third parties put upon inquiry—Liability of principal for notes, etc, when proceeds misapplied by agent.

HELD:—A party dealing with an agent is put upon inquiry to ascertain the extent of his powers, and when his authority to sign cheques or notes is limited "to a certain business", his principal is not liable for those given or subscribed by him and of which he has misapplied the proceeds. Cf. *La Granda Hermanos Y Ca v. The American Electrical and Novelty Mfg Co.*, 29 S. C. 444 ; *La Banque du Peuple v. Bryant et al.*, 17 Q. L. R., 103.

SAINT-PIERRE, J. :—

The two actions upon which I have to give judgment were taken out about the same date, in January 1905.

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on the condition that his advance would be covered by the note of the "Cie des Médecines Patentées Françaises." This was agreed to and the proposed exchange was carried out on the spot. On the suggestion of Berthé, a draft accepted by Vigaud was substituted to the note originally mentioned. This draft was then handed to Berthé who endorsed it in the name of the "Cie des Médecines Patentées Françaises" and deposited it in the branch of the Eastern Townships Bank in St Lawrence main street, at Montreal, where his principal, de Wertheimer, kept his banking account. On the other hand, Vigaud received in return from Berthé the note of the "Cie des Médecines Patentées Françaises" for a similar amount. This note was discounted by the latter at the branch of the Merchants Bank, at Mile-End, wherein Vigaud kept his banking account.

This however was not, by any means, the only exchange of commercial paper which took place between Berthé and Vigaud whilst de Wertheimer was away from home.

Vigaud tells us that during the same month of August 1904 each made an exchange of their respective note to the amount of \$130.50, Berthé acting all the while in the name of the "Cie des Médecines Patentées Françaises" in his capacity of "Fondé de pouvoir" or "procureur."

Then comes a note for \$102.00, dated October 28th 1904, which was given to Vigaud under the following circumstances :

"In the early part of the month of October, says Vigaud, " I was about to start on a trip that was to keep me away " from the town for some time, when Berthé came to me and " requested me to affix my name upon three promissory notes " which he desired to discount. I hesitated a little, but as we " were already in business together, I mean as we had already " exchanged paper before, I consented to give him my signa- " ture upon three notes which were then in blank on the condi- " tion, however, that the aggregate amount of the three notes " should not exceed \$250.00.

"On my return I saw Berthé and inquired about those notes.

" He told me that he had used the three of them. He then gave
 " me a note for \$102.50 on account. As this amount did not
 " cover the total amount made up by the three notes signed
 " by me, he said he would pay me the balance in cash.

"He was to pay me that balance as the three notes would
 " fall due."

Two of the notes thus given in blank were discounted by third parties who sued Vigaud upon them and recovered the amounts filled in by Berthé. Vigaud tells us that he had to pay the sum of \$200.00 in satisfaction of the debt, interest and costs in law-suits taken against him upon each of those two notes. As to the third one, he says that he never knew what Berthé did with it. He explains that the note of \$102.50 which was handed him by Berthé was signed by one Jules Savarin and made payable to the order " La Cie des Médecines Patentées Françaises" in the name of which it was endorsed in his favor through the agency of Berthé.

He further states that he sued Savarin upon this note and obtained judgment against him by default, but that Savarin having become insolvent, he could collect nothing from him.

This is not all yet.

On the 28th day of October 1904 Berthé always acting on behalf of the "Cie des Médecines Patentées Françaises" borrowed from the plaintiff Vigaud a sum of \$169.00 which was handed to him in cash.

In order to cover this loan, Berthé gave him a cheque upon the Eastern Townships Bank to the order of one R. P. Lauzon who consented to act as a mere "*prête-nom*" and who endorsed it in favor of the plaintiff.

This completes the series of exchanges between the plaintiff and the "Cie des Médecines Patentées Françaises." Our next inquiry will now be as to what became of the paper which was thus exchanged.

The note for \$238.00 which was covered by the draft for a similar amount accepted by Vigaud fell due in October. Each party paid \$38.00 on account and renewed for \$200.00, that is to say, Berthé gave the note of the "Cie des Médecines

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"Patentées Françaises" and the plaintiff wrote his acceptance upon a new draft reduced to the sum of \$200.00.

About the end of October or the beginning of November Berthé left for parts unknown.

In January 1905, de Werthemer who had then returned from his European trip paid the draft of \$200.00 to the Eastern Townships Bank, that is to his own bank wherein it had been discounted, and the note for \$200.00 given by Berthé and which had been discounted at the Merchants Bank and credited to Vigaud's account was charged to the latter by the bank.

The two notes for \$130.50 each given by Berthé to Vigaud to the "Cie des Médecines Patentées Françaises" for a similar amount appear to have both been disposed of in the same manner. DeWerthemer paid one and Vigaud the other.

We now come to the cheque for \$169.00 given by Berthé and made payable to the order of R. P. Lauzon upon the Eastern Townships Bank and to the note for \$102.50 signed by Savarin and made payable to the order of "Cie des Médecines Patentées Françaises" by which it was transferred to the plaintiff.

As I have explained above, the cheque for \$169.00 was given to cover the loan for a similar amount made by Vigaud to Berthé in cash on the 28th October 1904, and the note for \$102.50, which was given on the same day, was to cover in part the three notes signed in blank which Vigaud had handed some time previously to Berthé.

Those two papers form respectively the basis of the two actions I have now to deal with.

By the conclusions of his declaration in the suit bearing the number 1303 Vigaud, the plaintiff, prays that de Werthemer be condemned to pay him the sum of \$169.00 being the amount of the cheque made by Berthé on the 28th October 1904, in the name of the "Cie des Médecines Patentées Françaises," in favor of R. P. Lauzon and endorsed by the latter in his favor, plus \$3.16 for costs of protest, together with interest and costs.

In his action bearing the number 1781, he claims the recovery of \$102.50 due him upon the note signed by Savarin on the same day (the 28th October 1904) and endorsed in his favor by Berthé in the name of the "Cie des Médecines Patentées Françaises", plus \$3.16 for costs of protest, together with the interests and costs, as in the former case.

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Two distinct pleas have been filed in each case. They may be said to be identically the same, with this difference however, as to the form used, that whilst in the case No 1781 the plea is an ordinary defence, in that bearing the number 1303, judgment having been taken by default through some misunderstanding on the part of de Werthemer's counsel, the plea in this last mentioned case has assumed the form of an opposition to judgment.

Various grounds are set forth in the first plea, but the chief one is that Berthé had exceeded his authority in signing the name of the "Cie des Médecines Patentées Françaises" on the papers now sued upon.

In his second plea the defendant de Werthemer meets the plaintiff's claims by opposing by way compensation the draft of \$200.00 accepted by Vigaud, which draft he paid to the Eastern Townships Bank wherein it had been discounted, and also the sum of \$3.58 which he says he paid for the costs of protest. Taking up at once this second defence of the defendant, I will say that in my opinion the plea of compensation urged by him cannot be accepted.

The evidence shows that whilst on the one hand de Werthemer paid Vigaud's debt by settling the claim of the Eastern Townships Bank upon said draft, on the other Vigaud paid de Werthemer's debt by settling the note bearing the signature of the "Cie des Médecines Patentées Françaises" at the Merchants Bank, which had discounted said note for him.

The question as to whether Berthé had or had not acted within the scope of his authority does not come up here as both parties appear to have benefitted by the exchange of the paper referred to.

The proceeds of the draft went to increase de Werthemer's

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account in his own bank, whilst on the other hand Vigaud obtained the same advantage at the Merchants Bank. Those two negotiable instruments which were intended each to cover the indebtedness created by the other having been paid voluntarily by the party, liable upon them, there is now an end of this transaction, and the indebtedness in each case has become extinct by mutual compensation.

The other question raised offers greater difficulties and presents a larger field for discussion.

I will first take up the case bearing the number 1303 which as I said before, is based upon the cheque of \$169.00.

The cheque in question was signed in the following manner : "Cie des Médecines Patentées Françaises".

"A. BERTHÉ, *P. Pon*"

It is conceded that the letters "*P. Pon*" were intended to mean "par procuration."

Vigaud on receiving this cheque was therefore made aware of the fact that Berthé was acting under a power of attorney. Such being the case, was he not bound then to ascertain what the extent of Berthé's authority was under his power of attorney ?

It is well to observe at once that we are not dealing now with such a case as that I have mentioned above, wherein both parties were proven to have benefitted by the commercial paper received, and wherein both had consented to wipe off their mutual indebtedness. De Werthemer tells us that he never received one farthing of that money which, as I have explained above, was money which was handed in cash to Berthé, and that no traces of it could be found in his books.

Now, had Vigaud taken the trouble to procure the power of attorney under which Berthé was acting, he would have read in it that whilst Berthé was given full power to sign cheques, drafts or orders for the payment of money, yet such power was to be used solely for the business of the "Cie des Médecines Patentées Françaises" and for no other object.

This cheque for \$169.00 was dated the 28th October 1904.

On the same day Vigaud obtained from Berthé, acting al.

ways in the name of the "Cie des Médecines Patentées Françaises," a note signed by one Jules Savarin which proved to be worthless in so far as Savarin was concerned.

The proof shows that this last note was given to cover in part the three promissory notes signed in blank by Vigaud, two of which were later on discovered to be in the hands of third parties.

And here again de Werthemer swears that he got nothing of the proceeds of those notes.

The signature which is to be found on the back of this note of \$102.50 is similar to that which is seen at the foot of the cheque just referred to. In both instances Berthé signed the name of the "Cie des Médecines Patentées Françaises" to which he added his own name as "procureur."

This last paper is that upon which the second action, to wit, that bearing the number 1781 has been based.

A day or two after obtaining the proceeds of the notes signed in blank and the sum of \$169.00 paid him in cash, Berthé disappeared, taking all that money with him and much more besides, says de Werthemer, which had been obtained from others in the same way.

Now comes the question : who is to be the looser under the circumstances just explained ?

Should it be de Werthemer who took particular care to limit his agent's authority by means of a carefully worded power of attorney which Vigaud might have consulted had he chosen to do so, or should it not rather be the party who failed to ascertain the extent of Berthé's authority and who imprudently trusted him ?

The rule on this point is thus laid down by Mr Justice Story in his book "on agency" :

"Where an authority purports to be derived from a written instrument, or the agent expressly signs the contract, or other paper introduced, with the words "by procuration"
 "in such a case the other party is bound to take notice that there is a written instrument of procuration, and he ought to call for and examine the instrument itself, to see

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" *whether it justifies the act of the agent. For, under such cir-
 cumstances, goes on the writer, it is but a reasonable pre-
 caution and exercise of prudence and, he is put upon
 inquiry. And if, from his omission to examine, he should
 encounter a loss from the defective authority of the agent
 it is properly attributable to his own fault, since he must
 know, that he has no other security than his reliance upon
 the credit of the agent.*"

"It has been said by a learned Judge, continues the author,
 that the same principle prevails in the civil law ; for, if a
 person is acting *ex-mandato*, those who deal with him must
 look to his mandate."

(Story on agency, paragraph 72).

This however is not the end of the controversy between
 Vigaud and de Werthemer :

" I admit, says Vigaud, that I did not ask to see Berthé's
 power of attorney, but had I had an opportunity of seeing
 it, I would have detected no reason in it, by which I might
 have been averted from acting exactly as I did." By his
 power of attorney he further explains that Berthé was author-
 ized to sign notes, accept drafts or orders for the payment
 of money on all or any bank or banks wherein he had or
 might hereafter have any money . . . provided such acts
 were made for the business of the "Cie des Médecines Pa-
 tentées Françaises" only. "Now, says Vigaud, when I made
 the advances referred to in my two actions, I did so on the
 representation made to me by Berthé that the money thus
 obtained from me was for the business of the defendant.
 True, he adds, it turned out that Berthé did disappear, taking
 that money with him ; but who is to be the looser ? Should
 not that party suffer who, by his own acts has enabled his
 employee to impose upon me ?"

This contention of the plaintiff must be met by two distinct answers :

10.—The power of attorney being clear that no notes
 drafts or other negotiable paper could be given or signed by
 Berthé except for the business of the defendant, Vigaud should

have made sure that his money was to be used for the purpose specified, and that it would not be pocketed by Berthé or used for his personal benefit. It was his duty to be cautious as to what use was made of the money he thus advanced to Berthé. He was supposed to trust de Werthemer whose paper he was accepting in return for his own or for his money and not Berthé. By neglecting to exercise the caution and supervision which the power of attorney imperatively required, he simply took Berthé's word and thereby trusted him. The latter having appropriated his money, he is now left with no other recourse, but that which he might exercise against the man he trusted and not against his employer who had acted with prudence and caution by limiting his liability with respect to the acts of his agent within certain prescribed bounds which unfortunately for the plaintiff, Berthé has overstepped.

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20.—The second answer is as follows : although Berthé had the power to sign notes, drafts, etc, there is nothing in the written document called the "power of attorney" to show that he was vested with the authority to borrow money, or to pledge the credit of the "Cie des Médecines Patentées Françaises" upon loans or advances which might be obtained from third parties.

The following opinion which I also find in Judge Story's book appears to me to be quite in point.

" § 62. On the other hand, language however general in form, when used in connection with a particular subject matter, will be presumed to be used in subordination to that matter, and therefore construed and limited accordingly. And it will make no difference in the construction, that this general language is found in very formal instruments, such as a letter of attorney."

"Thus where a power of attorney authorized an agent to ask, demand, and receive from the East India Company, or whom it should or might concern, all money that might become due to the principal, on any account whatsoever, and to transact all business, and on non-payment to use all lawful means for the recovery, and, on payment to give proper re-

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"ceipts and discharges, with power to appoint substitutes, and
 "giving his (the principal's) full power and authority in the pre-
 "mises, with the usual clause of ratification ; it was held that
 "the words " to transact all business *did not authorize the*
"agent to endorse an East India bill, received under the letter
"of attorney in the name of the principal, and to procure dis-
"count thereon, on such endorsement ; for the words "all bu-
"siness" must be construed to be limited to all business neces-
"sary for the receipt of the money."

See Story on agency, paragraph 62.

See also paragraphs 63, 64, 65, 66, 67, 68, 72 and 76.

At paragraph 21. I find the same rule laid down in language equally clear and explicit: "Thus, he says, if a merchant
 "about to go abroad for temporary purposes, should delegate to
 "an agent his full and entire authority to sell any of his per-
 "sonal property, or to buy any property for him, or on his ac-
 "count, to make any contracts, or to do any other acts what-
 "soever, which he could, if personally present ; this general lan-
 "guage would be construed to apply only to *buying or selling,*
"connected with his ordinary business or a merchant, and
"would not . . . be construed to apply to a sale of his household
"furniture, or library . . . much less would it be construed to
"authorize any contracts to be made which would be of an ex-
"traordinary or personal character.

That the particular exchanges referred to in the present cases were considered by the parties themselves to be of an unusual character is made apparent by the special care which both Berthé and Vigaud took in concealing the real nature of the transaction.

In each instance the loan was made to appear as a debt due by a client of the house in favor of which it was made.

Thus, for instance, in the case of the exchange of the \$238.00, the supposed indebtedness of Vigaud was made to appear in the form of a draft drawn by the "Cie des Médecines Patentées Françaises" upon G. Vigaud to the order of the Eastern Townships Bank which was the bank wherein de Wertheimer kept his account.

The cheque for \$169.00 instead of being drawn to the order of Vigaud was made to the order of R. P. Lauzon, a young man in the employ of Vigaud who is admitted to have acted as mere "*prête-nom*" in the transaction.

The same observation might apply also to the note for \$102.50 which instead of bearing the signature of the "Cie des Médecines Patentées Françaises" as *maker*, was signed by one Jules Savarin who was a small trader on the verge of insolvency.

The plaintiff's counsel has laid much stress upon the fact that de Werthemer having taken up some of that exchanged paper after his return must be presumed to have ratified the acts of his agent Berthé generally.

I cannot accept this conclusion. It is undoubtedly true that de Werthemer took up the draft for \$238.00 and the note for \$130.00, but he did so, protesting all the while that he was not liable upon said paper and that he intended to reserve whatever recourse he might have against Vigaud.

But I would go a step further and say that whilst it is true to say that Berthé had exceeded his authority with respect to said two negotiable instruments as well as with, respect to the others, it is equally true, as I have already explained that both de Werthemer and Vigaud, has benefitted by the proceeds of the discounting of them.

The case therefore was not a parallel one to that now submitted to me, and de Werthemer might have paid up his indebtedness to his bank which had supplied the money and credited him with the proceeds, without his action being thereby construed as an acknowledgement that Berthé had done that which he had a right to do.

For all those reasons, I have come to the conclusion that the defendant de Werthemer cannot be held liable upon the two negotiable instruments sued upon in the two joint cases submitted to me, and that those two actions should be dismissed. They are therefore dismissed with costs.

Beaubien & Lamarche, for the plaintiff.

Archer, Perron & Tuschereau, for the defendant.

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SUPERIOR COURT.

MONTREAL, December 29th 1906.

Present :—DUNLOP, J.MORGAN-SMITH ET AL. V. THE MONTREAL
LIGHT, HEAT & POWER COMPANY.

Contracts—Contract for manufacture of goods—Notice amounting to repudiation of contract—Liability for breach of contract.

HELD :—A party who contracts for the manufacture of machinery and afterwards notifies the manufacturer that he will not accept delivery of it, unless certain guarantees respecting it, not mentioned in the contract, be given him, is thereby held to repudiate the contract and becomes liable for the price of the machinery, less whatever value it may have for the manufacturer.

DUNLOP, J. :—

This is an action brought by the plaintiffs, a company doing business at York, in the State of Pennsylvania, in the United States of America against The Montreal Light, Heat and Power Company for the sum of \$42,783.93 claimed as damages caused to the plaintiffs by the defendant's breach, abandonment and repudiation of a contract entered into between the plaintiffs and the defendant, at Montreal, on the 29th of April 1902. The plaintiffs claim that the defendant has repudiated and abandoned the contract and prevented the plaintiffs from carrying it out, and that they have a right to proceed in damages, as they have done by the present suit.

The contract was to deliver a large quantity of materials and machinery at Ste Therese, in the Province of Quebec, to be used in certain works of water power development, which the defendant proposed constructing at that place. A synopsis of the pleadings is given in the judgment as drawn, and it

is unnecessary to recite them here, as they are very voluminous.

The company defendant contends that the obligations assumed by the plaintiffs under the contract in question regarding the delay for delivery, the test to which the machinery was to be subjected, the guarantees and the acceptance of the material, were of the essence of the contract, and conditions precedent to any action by the plaintiffs for the price, and that the defendant would never have entered into the contract, unless the plaintiffs had so undertaken, and that the plaintiffs have not fulfilled the obligations assumed by them.

The defendant also contends strongly that they have never repudiated or abandoned the contract. The real controversy, as I view this case, is as to whether there was a repudiation of the contract. Mr Cooper, who was employed by the defendant company, says that the contract was not abandoned owing to the sufficiency of the test at Holyoke. It may be said that Cooper was employed by the company defendant to make a report on all their works at Ste Therese, and of the scheme which was being initiated there for the development of water power, and that he condemned the whole scheme, and advised the company defendant to make the best terms they could with their contractors, as appears by his report sent to the company of date the 12th of February 1903 ; and it appears that they have settled with one contractor, but have refused to pay the plaintiffs any sum of money whatever.

There is one thing certain and that is that at the time of the writing of the defendant's letter to the plaintiffs demanding the guarantees therein mentioned, that both the plaintiffs and the defendant looked upon the contract as being in full force and effect. This was the interpretation put on the contract by both parties. This letter was written on the 17th of November 1903 and this appears also from a minute of the executive committee of the company defendant of about the same date, wherein it is stated that a letter had been writ-

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ten by the company defendant to the plaintiffs to delay further shipment of the machinery.

The evidence discloses that the works at Ste Therese were an adjunct or auxiliary to the principal works at Chambly. This is what is termed in the evidence *a booster proposition*. On the 30th of November 1903, the Chambly dam was carried away and it is proved that after that date practically no work was done at Ste Therese, and it is also proved that a large travelling crane which, under the terms of the contract, the plaintiffs had the right to use in carrying out the contract, was sold by the company defendant. Cooper's report condemning the whole scheme is dated the 12th of February 1903. Macklin, the engineer, who had originally approved of the Ste Therese scheme of development, was dismissed by the company defendant about October 1902, about four months previous to the date of Cooper's report. It is also in evidence that Mr Walbank, the company's engineer, condemned the whole Ste Therese scheme. Early in January 1903, a considerable portion of the machinery and materials called for by the contract was delivered by the plaintiffs to the defendant in Ste Therese, and accepted by the company defendant, but this acceptance was subsequently repudiated. Subsequently, the company defendant notified the plaintiffs to ship certain wheels to be tested at Holyoke, in the United States. This was done on the 27th of March 1903, in a satisfactory manner showing as I view the case, that the machinery tested complied with the conditions of the contract. This test was also approved by Mr Cooper's representative who was present when the test was made.

It will be seen from Cooper's report hereinafter referred to, that he states that the second error in the Ste Therese scheme of development was in contracting for water wheels wherein the contract specifies that the speed and power were to be developed under full gate. This must be taken into consideration in judging of the sufficiency of the test made at Holyoke on the 27th of March 1903.

A second test was made in the beginning of September 1903 at the instance of the defendant company for their own purposes, and was not, as I view the case, in any way obligatory on the plaintiffs. Cooper admits that the test was not a fair one under the circumstances under which it was carried out.

The next step taken in the matter was that the company defendant on the 17th of November 1903, notified the plaintiffs that it refused to accept the machinery and work then in the course of manufacture, or to permit its installation, unless the plaintiffs would become responsible and guarantee the sufficiency and adequacy of the whole plant as designed by the company defendant, its officers and employees, and would assume and accept the liability imposed on builders by articles 1688 and 2259 of the Civil Code of Lower Canada, not merely in respect of the work to be done to the machinery and materials to be furnished by the plaintiffs, but in respect of the whole plant in the designing and construction of which the plaintiff had no interest or part, and in which they were in no way concerned under the contract of the 7th of April 1902, the whole as set forth in a letter addressed by the defendant to the plaintiffs, whereof a copy is filed. Subsequently, on the 12th of December 1903, and the 12th of December 1904, the plaintiffs formally notified the defendant of their refusal to accept any such conditions, and obligations, as mentioned in its letter of the 17th of November 1903, and stated that they intended to complete the contract and notified the defendant to hasten preparations for the reception of a large portion of machinery which had long since been ready for delivery, and the plaintiffs did, shortly afterwards, about the 17th of February 1903, ship to the defendant a considerable portion of the machinery manufactured by them under the contract. In reply, the defendant company notified the plaintiffs, absolutely refusing to accept the said material and machinery unless the plaintiffs would assume the guarantees referred to in the defendants' letter of 17th November 1903. On the 8th April 1904 the plaintiffs formally notified the defendant that they were and had been for some time in a position to immediately complete the

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delivery, erection and installation of all the machinery called for by the contract of April 7th 1902, and that in view of the defendants' refusal to accept or pay for the work, unless the guarantee asked for was furnished, the plaintiffs would consider the defendants' repeated refusal to allow the completion of the work as a repudiation of the contract, to which notification the defendant made no reply.

It will be seen that the defendant refused in the most positive terms, on the 22nd of February 1904 to accept the machinery. The plaintiffs had notified it on the 21st of February 1904, advising it that they had shipped to it on the 17th of February 1904, three railway car loads of water wheel machinery, in fulfilment of the contract, and in reply received from the company defendant a letter in the following terms :

" I beg leave to acknowledge receipt of your letter of the 18th instant advising that you have shipped three cars of water wheel machinery for the Ste Therese plant. As I advised you previously, you are shipping the material at your own risk, and unless we get the guarantee asked for, we will not accept the same."

. If a party to a contract for the delivery of a quantity of machinery imposes on the contractor great responsibilities, not mentioned in or justified by the contract, rendering it impossible for the contractor to carry out the contract, this appears to me to be a complete repudiation of the contract, and this is what has been done in the present case.

The letter from Mr Etnier, secretary of the plaintiffs, makes clear the position of the company defendant. This letter is dated the 8th of April 1904, and is in the following terms:

" As you have expressed your verbal intentions not to accept our written proposition of March 30th, 1904, submitted at your request for furnishing turbine wheels for your Lachine plant, making use as far as possible of the turbines and materials intended for the Ste Therese plant under contract of April 7th 1902, and also for cancelling the said contract, and as you have likewise decided not to accept our proposal made on April the 6th 1904, at your request, for storing the un-

" delivered turbines and materials for you at York, Pa, instead
 " of erecting them, we beg therefore to advise you that each
 " of said offers is withdrawn. We shall therefore stand on our
 " rights under the agreement of April 7th 1902, and in this
 " connection we beg to repeat that we shall sign no guarantees
 " except those specified in said agreement. We have sufficient
 " materials and machinery at your power site at Ste Therese
 " and Richelieu, to commence the erection of the turbines on
 " your foundations in accordance with your contract of April
 " 7th 1902, and the balance completed and ready to ship as
 " fast as the same can be used. Our erecting man Mr Lock-
 " man has been, and is now there for that purpose. We find
 " the foundations are not sufficiently advanced to receive the
 " work. In view of this, and in view of the correspondence
 " especially of your letter of January 1st 1904, in which you
 " state that you will not acceptor pay for our wheels and mate-
 " rial if erected, please advise me at once at the Windsor hotel
 " if this inference is correct, as otherwise we shall assume that
 " it fairly sets forth your position and that you have repudia-
 " ted the contract, and we shall bring an action against you for
 " damages."

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No reply was made to this letter although it was made perfectly clear to the defendant that a failure to reply to it would be considered as a repudiation of the contract, and an action in damages was instituted.

It might be noted that the first plea of the company defendant was that the plaintiffs did not manufacture or deliver in the time called for by the contract. As I understand the case, this plea must disappear. Time was not of the essence of the contract in any shape or form. The company defendant had called for considerable alterations in the levels of the power house, and in other respects.

These alterations caused a certain amount of delay, but whatever delay may have been caused, was absolutely and entirely waived by the defendant by the stand it took. The so called delay lapsed on the 7th of December 1902, that is

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to say within 210 days after the contract was signed, but in the following January, the company defendant asked the plaintiffs by telegram and by letter, to stop work on the wheels, and to delay shipment pending tests, and to do certain things pending the return of Mr Cooper. As I view the case, there has been an absolute and complete waiver of any delay, and that waiver has been recognized by the company defendant.

With regard to the lipped gates, I think the evidence of Mr Macklin completely disposes of this. At page 8 of his deposition, he was interrogated as follows : —

“Q.—Now, Mr Macklin, would you tell us what you did state with regard to what was said to you by Mr Etnier as to the regulation or the use of lipped gates, this morning ?

And Mr Macklin answered :

“A.—My recollection of it was the wheels that were supposed to be put in at Ste Therese would be an improvement on those at Chambly.

“ Q.—With reference to what ?

“ A.—With reference to the lips on the gates.”

And further on he is asked :

“ Q.—To regulation ?

“ A.—No, not regulation, but with reference to lips on the gates, and they were to be put in better shape than they were at Chambly. ”

It will be seen that Mr Macklin for the second time makes the unqualified statement that he, as the chief engineer of the company defendant, was assured by Mr Etnier, secretary of the plaintiffs, that his company would be in a better position as regards regulation at Chambly and that lips would be used on the gates in the new construction at Ste Therese.

The report of Mr Cooper, dated the 12th of February 1903, produced by Mr Holt when examined on discovery, has a material bearing on this case, as it clearly demonstrates that from that date, the company defendant absolutely abandoned the Ste Therese scheme. It is unnecessary to read at length

this report, but it commences in the following words, being addressed to the directors of the company defendant :

" Gentlemen : I have examined the plans that have, been prepared for this construction (referring of course to the " Ste Therese scheme) and I have examined the location for " the proposed works, and I am familiar with the design and " with the work done to date. As a result of the foregoing " examinations, I regret the necessity of having to inform you " that in my opinion the scheme of power development at Ste " Therese has been founded on so many errors, for which there " seems to be no cure. that in my opinion a further expenditure " of money at Ste Therese in the direction of power develop- " ment would be useless". And further on he states : " The " first error that was made in this design was the attempt to " build too large units. The second error was in connect- " ing for water wheels wherein the contract specifies that " the speed and power were to be developed under full gate, " where the specifications should have been, in this case, that " the speed and power should have been taken off at not more " than six tenths gate in order that the regulation might be " permissible and that differences in head might be taken care " of. "

In addition to Mr Cooper's report condemning the Ste Thérèse scheme, it would appear that Mr Pringle's firm was retained by Colonel Henshaw, one of the directors of the company defendant to make a report on the conditions at Ste Thérèse, and that they did make such a report, and that it was also unfavourable. Mr Henshaw, the former secretary treasurer of the company testified that the report was read by him at a director's meeting, that it was brought to the knowledge of the whole board of directors of the company, and that it created " such a stir that it sort of delayed matters ". At page twenty of his deposition he was asked why the report was not entered in the minutes, and he answered. " The report was ' not entered in the minutes, because they did not want to create a tempest in a teapot before anything did come out. " It is evident, therefore, that there is absolute evidence that a

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Another defence set up to the plaintiffs' action is, that under the contract the plaintiffs were bound to give a bond to the defendant, which they had not given, and that the giving of this bond was a condition precedent to any action being taken by them. It does not appear that the plaintiffs refused to give this bond, nor is it established that the giving of such a bond was a condition precedent to the taking of the present action. It seems to me that the defendant was wrong in not taking the advice given by its engineer, Mr Cooper, in the first instance, to settle with the different contractors, and amongst others with the plaintiffs as he distinctly advised.

On the whole case, I am of opinion that the company defendant repudiated and abandoned the contract in question, and that it is consequently liable to the plaintiffs in damages.

The plaintiffs contend that on the question of damages, the defendant did not see fit to adduce any evidence, and they submit they are entitled to the whole amount of the contract price, less certain deductions which Mr Smith, the vice-president of the company plaintiff, has himself allowed in the form of credits given in the action, and to that must be added the costs of the governors, less the amount which Mr Smith says he is bound to suffer, on the re-sale of the governors. The plaintiffs further contend that the cost of these governors was about \$8,610. Mr Smith says he thinks he can sell the two larger governors at a loss of from \$1,200. to \$1,600 and that the loss on the two small governors would be \$400, and that practically the loss on the governors is \$2,000, and that credit should also be given for the value of the materials to the company plaintiff as scrap iron, which value Mr Smith says is \$12.00 a ton, making a total value of \$2,826 for 335 tons, which he contends the plaintiffs would be obliged to break up and put in their furnaces.

The plaintiffs contend that after allowing these credits they are entitled to a judgment for \$33,347.93 instead of the full amount sued for.

It has been strongly contended by the defendant that it was the duty of the plaintiffs to minimize the damages in every possible way, by selling the material and machinery that was delivered, while the plaintiffs on the other hand contend that it was none of their business to find a purchaser, that the machinery consisted of special wheels which they contracted to sell the company defendant, and for which the company defendant agreed to pay a certain sum of money, and that the machinery in question is not an ordinary article of commerce that can be sold on the market.

The witnesses Kennedy and Lea both scout the scrap iron theory, and they say the wheels must be worth a great deal more than scrap iron, because they can be adapted to different heads, but it may be observed that this was only an expression of opinion, and no witness has come into the box and contradicted the evidence of Mr Smith, who stated that these wheels were worth so much, and no one has stated that there is a purchaser for these wheels giving his name, and the amount he would pay, while Mr Smith distinctly stated that as far as the plaintiff was concerned, the material has no other value than as scrap.

The obligation of the defendant company was to pay for what they bought. They have had delivered to them a certain part of the material and there has been a repudiation of the contract. For one or more of the elaborate reasons by them given from time to time, they have refused and rejected the wheels, and have thrown them back on the hands of the plaintiffs.

I am of opinion that under the law and under the authorities which will be hereafter cited the company plaintiff was not obliged to go out on the market and sell the wheels, that they were not obliged to take the risk of selling them to somebody who might never pay for them, that they were not obliged to send all over the country to find out the different heads of water where these wheels might be properly used. The plaintiffs contracted to give the defendant company special wheels, to meet a special set of circumstances. The com-

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pany defendant have abandoned their enterprise at Ste Therese, and have thrown the special wheels back on the plaintiffs' hands.

It remains to be seen whether the plaintiffs' action is well founded, and if so, for what amount they are entitled to judgment.

As to the form of action, the company defendant contended that the plaintiffs ought to have tendered the wheels, and renewed the tender in any action they might bring.

The plaintiffs are a firm doing business five or six hundred miles from Montreal furnishing materials that weigh some 450,000 pounds. They have a lot of this material lying on the banks of the Richelieu, and it has been lying there for the last three years from January 1903 to March 1906. The company defendant refused to have anything to do with this material unless the plaintiffs would guarantee that the whole of their installation at Ste Therese would run satisfactorily. Under the circumstances what could the plaintiffs do? What was the use of a tender to people who say: "You can tender, but as far as we are concerned we won't accept?" If an action had been taken for the price, and the material tendered, the answer would have been, we have refused your tender long ago. The company defendant denied that there ever was an effective contract after a certain date, and that they had repudiated the contract and denied their liability to take the material, and that the plaintiffs' recourse was an action in damages.

It appears to me that under the circumstances and conditions of this case, a tender was absolutely unnecessary and that the only possible action was an action in damages. If the defendant company insist and persist in the stand they have taken in this matter, to repudiate this contract and to say in effect "keep your material, we don't want it. We won't take it", it would appear that the appreciation of value that the plaintiffs put upon the material is the proper appreciation. The plaintiffs have proved that the material and wheels contracted for were thrown back on their hands, and that it has

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to them value as scrap iron only. The plaintiffs refer to cases which are mentioned in Mayne on Damages, citing from the Library edition, namely the 6th edition, from page 176 to page 180, wherein cited cases referring to the obligation of a purchaser, or the obligation of the vendor where a contract of sale has been repudiated, to take the necessary steps to mitigate the loss and this author deals with just the difficulty that has arisen under circumstances similar to those raised in the present case. He says: "But is the plaintiff bound as a matter of law to do anything. In an action for breach of contract to supply a cargo, Martin B. said "It would be doubtful whether a party who breaks a contract has a right to say to a party with whom he breaks it "I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me of it." I am not satisfied that the person who breaks a contract has the right to insist on that at all, but if the ship had earned anything the defendant would be entitled to a reduction in respect of that. I am not prepared to say that the person with whom the contract is broken is bound to go and look for employment for a ship when the freight has been lost by reason of that breach of contract. It seems to me that that matter ought to be dismissed entirely from consideration." Then he goes on to say at page 181: "But the Court denies that the plaintiff was under any such obligation. Kelly C. B., pointed out that the defendant might fairly say that the plaintiff had no right to enter into a speculative contract and might insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand."

The plaintiff company contend that they dare not make a speculative contract for themselves for the material they had on hand, and that they dare not under the circumstances go to the expense of having these wheels readjusted and rebuilt to suit another condition of affairs that might or might not ever exist, for which they might or might not ever have an order. They also contend that the wheels may be on their

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hands for an unlimited time, and that there is no purchaser in sight. None was suggested by the company defendant, nor did they suggest any market, nor did they establish any market price. It seems to me under these circumstances, that the Court is bound to adopt the value that the plaintiffs have put on it, that is, the value to them as scrap, inasmuch as the machinery and materials had been thrown back upon them through no fault of theirs, but by the fact that the company defendant failed to take the good advice given to them by their engineer Cooper, in the first instance, that they should make the best settlement they could with the contractors of which the company plaintiff were.

As I view the case, the plaintiffs are entitled to damages for being prevented from completing their contract and receiving the agreed price, taking into account whatever the unfinished machines left on their hands were worth to them.

Reference might be made to Sedgwick on Damages, section 618, 8th edition, page 270, also to the case of *Black vs Woodrow and Richardson* ⁽¹⁾ reported in Sedgwick's Leading Cases on the measure of damages, page 377, and the cases cited in the report of said case, and amongst others to the case of *Cort and Gee vs Ambergate etc R. Company*, ⁽²⁾ where there was a contract for the manufacture and supply of a certain quantity of railway chairs by the plaintiffs for the defendants to be paid for after delivery, and the defendants, having accepted and paid for a portion of the chairs gave notice to the plaintiffs not to manufacture any more, as they, the defendants, had no occasion for them, and would not accept or pay for them. In an action upon the contract it was held that as the plaintiffs were desirous and able to complete the contract, they could, without manufacturing and tendering the rest of the chairs, maintain an action against the defendants for breach of contract. It was also held that the simple noti-

(1) 39 Md. 194.

(2) 17 Ad. & E. N. S. 127.

ce by the defendants to the plaintiffs that the latter should not go on to supply the rest of the chairs, entitled the plaintiffs to recover on an account alleging that they were ready and willing to perform the contract, and that the defendants refused to accept the residue of the chairs and prevented and discharged the plaintiffs from the further execution of the contract, that such a notice by the defendants was a legal prevention though there was no other act of obstruction.

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So in the case of *Derby et al. vs Johnson et al.* (1) : There the plaintiffs and defendants entered into a written contract by which the former engaged to do all the stone work, masonry and blasting upon a certain piece of railway at certain specified prices by the cubic yard. The plaintiffs entered upon the performance of the contract, and while they were so engaged the defendants gave them directions to quit the work and to do nothing more under the contract, and the plaintiffs having quit the work as directed, it was held to be no relinquishment of the contract on their part, but that the defendants in giving the notice and stopping the work, were in the exercise of a right that belonged to them, leaving themselves liable, of course, for all consequences resulting from their breach of contract.

In the present case the letter of the company plaintiff of date the 17th of november 1903 demanding the guarantees, was in my opinion, a legal prevention, and the plaintiff company was thereby prevented by the sole action of the company defendant from completing their contract which they were ready and had notified the company defendant that they were willing to do.

I am therefore of opinion that the company plaintiff by reason of defendants breach, repudiation and abandonment of said contract has suffered damages to a large extent, and for which the company defendant is liable, and the Court as-

(1) 21 Vt. . 17.

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sesses said damages at the sum of \$33,347.93, the whole as appears by a statement embodied in the judgment as drawn.

Judgment will therefore go in favor of the plaintiffs for this amount, with interest from service of process, and costs.

Lafleur, MacDougall & Macfarlane, for the plaintiffs.

McGibbon, Casgrain, Mitchell & Surveyer, for the defendant.

COURT OF REVIEW.

MONTREAL, May 31st, 1906.

*Present:—*TASCHEREAU, PAGNUELO & CHARBONNEAU, JJ.

THE CORPORATION OF THE TOWNSHIP OF ONSLOW v. MCGOUGH.

Possession—Private road—User by the public with permission of the owner—Action en complainte.

HELD:—A road originally opened as a private road on private property will not be presumed to have become a public road in the possession of the municipality in which it lies, merely because the owner has allowed the public the use of it for six years without objection. The municipal corporation cannot therefore proceed *en complainte* against the owner who closes the road.

CHARBONNEAU, J., *dissentiente*.

The judgment inscribed for review was rendered in the Superior Court, CHAMPAGNE, J., at Bryson, on the 9th of February 1906, as follows :—

CHAMPAGNE, J. :—

This is a possessory action accompanied by a petition for an injunction by which the plaintiff complains that the defen-

dant, in the month of April 1905, illegally closed and obstructed a certain road lying between lots Nos 6 and 7a, in the 7th range of the township of Onslow, that had been until then and for more than five years previous thereto, open and maintained as a municipal and public road.

On the day of the institution of the action, an interlocutory order was granted enjoining the defendant to remove all obstructions and barriers placed by him across the road in question until it should be further or otherwise adjudged by the final judgment.

The plea of the defendant is that the public never had, as alleged, the possession of the road in dispute, but that the same is a private road forming part of the defendant's land and used as such ; and that, if of recent years it had been used by the public it was by mere sufferance on the part of the defendant.

The facts established by the evidence are that in 1898, the defendant was, as he is still, the owner of lot No 7 in the 8th range of the township of Onslow, where he resides with his family ; and the plaintiff was then the owner of lot No 7a in the range, fronting lot No 7 of the 8th range.

We find in the minutes of the council of the plaintiff at the date of the 7th of March 1898, the following entry :—"John McGough (the defendant) appeared at the board asking a road from his own place to the main road, and it was resolved : "that this council grant him a road 28 feet wide on the west side of lot No 7 and alongside of lot No 6 as far as the main road." The road so granted to the defendant, and subsequently opened by him, is the road lying on the lot No 7a, near the division line of lots Nos 6 and 7a, in the 7th range and described in the plaintiff's declaration ; and the *main road* means an old municipal road crossing, among other lots, the lots Nos 6 and 7a, in the 7th range of Onslow.

On the 17th of December 1898, by a resolution of its municipal council, the plaintiff put up for sale lot No 7a, in the 7th range, the resolution containing the following reservation, viz :—"This council reserving the right of holding the old

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“travelled road across said lot.” On the same day, the defendant became the purchaser of lot No 7a in the 7th range and took possession thereof, the mayor being authorized by resolution to sign and execute a proper deed in favour of the defendant. The road in question was opened by the defendant under the permission given to him by the plaintiff; and after his acquisition of the lot it was maintained by him for his own convenience and utility in order to connect the old municipal road above mentioned with his premises on lot No 7, in the 8th range.

Shortly after the opening of this road, one Alexander, the proprietor of lot No 6 in the 7th range took upon himself to close the old municipal road existing for over thirty years across his property extending east to lot No 7a and other lots in the 7th range. Then the defendant in order to be of service to his neighbors and to the public, allowed the inhabitants of the township to pass on his private road to reach the public road crossing his land until such time as the plaintiff would take the necessary proceedings for the re-opening of the public road at Alexander's.

From the year 1898 to the month of June 1905, the plaintiff, by its municipal council, has often acknowledged the public road passing on Alexander's property as the only municipal road existing in that locality, by adopting various resolutions to the effect of re-opening the road and to have it maintained at the place where it had been originally located, and by ordering legal proceedings to be instituted against Alexander for having illegally closed the same. In fact, in the month of June last (1905), an action accompanied by a petition for an injunction was instituted for that purpose against Alexander, but these proceedings appear to have been since abandoned.

On the 18th of June 1904, a notarial deed of sale of lot No 7a in the 7th range of Onslow based on the resolution of the 17th December 1898 was given by the plaintiff to the defendant; the only reservation made in this deed is in the following words:—“the said corporation excepts from this present sale

" the old travelled road across said lot which is not included
 " in the present sale and remains the possession and the prop-
 " erty of the said corporation." Therefore the whole of the
 remainder of the lot was sold to the defendant, including that
 portion which had been opened, used and possessed by the
 defendant as a private road, since the year 1898, the plaintiff
 thereby again acknowledging that the said *route* was not a
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The fact that once in five years, and for three quarters of
 a day, two men employed by the plaintiff, with a pair of hor-
 ses, did some work of repairs to the road in question can-
 not constitute and be construed as being an abandonment or
 dedication of the road-way by the defendant in favor of
 the public. I hold that when it was first established it was
 intended to be and was in fact a private way and remained
 such ever since, and that it has always been possessed by the
 defendant as a portion of his land ; that there never was
 any dedication of the road to the public ; that the use
 with the public had of the same has only been tolerated by
 the defendant, and that under all the circumstances of the case
 the defendant was justified and was acting within his rights
 in closing it and excluding the public therefrom.— I may add
 here that the defendant has often, but in vain, protested the
 plaintiff to cease, itself and the public, from passing on his
 property and using the road in question.

The plaintiff complains also that the old municipal road, at
 the south east corner of lot No 7a in the 7th range had been
 closed by the defendant ; it was not closed by the defendant, but
 by one Walsh, the owner of the north part of lot No 8 in the
 same range. The closing of the road by Walsh at that particu-
 lar point had the effect of diverting it and inducing the pub-
 lic to make a circuit and to pass on the defendant's property
 the plaintiff never claimed the land forming this circuit or de-
 viation as part of the old road, and the use of it by the pub-
 lic would, in any event, be a mere act of toleration on the part
 of the defendant, conferring no right whatever on the plain-
 tiff. Moreover it is in evidence that the obstructions placed in

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the road by Walsh have been removed by the order of the plaintiff.

On the whole, I find that the defendant is entitled to invoke against the pretensions of the plaintiff, the principle that no one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid (C. C. 407). If it is considered to be in the public interest that any portion of the defendant's farm or his private road above mentioned should be converted into and used as a public road, the plaintiff can easily and within a short delay attain such an object, by following the procedure and complying with the provisions prescribed by the municipal code.

The following authorities are in point.

Caractères de la possession : —

" Il faut qu'elle soit continue et non interrompue, paisible, " publique, non équivoque et à titre de propriétaire." Art. 2193 C. C.

Art. 2194. " On est toujours présumé posséder pour soi et " à titre de propriétaire, s'il n'est prouvé qu'on a commencé " à posséder pour un autre."

Art. 2196 C. C. " Les actes de pure faculté et ceux de simple tolérance ne peuvent fonder ni possession, ni prescription."

Fuzier-Herman & Darras.—Supplément, Vol. 2 C. C. Annoté sous l'art. 2229 C. N. No 13— " Sauf la différence de " durée, la possession doit présenter les mêmes caractères, pour " former la base d'une action en complainte, que pour opérer " la prescription. Cass. 22 Oct. 1900."

Les terrains ou passages occupés comme chemins par simple tolérance continuent à appartenir au propriétaire ou à l'occupant :—Arts. 749,750 C. M.

Procédures relatives à l'ouverture de chemins municipaux :—Arts 526,7,8-794 C. M.

Expropriation :—Art. 407 C. C.—Arts. 902,3 C. M. jurisprudence sous ces articles dans Bédard C. M.

Laurent, t. 32, au No 297 :—"La tolérance exclut l'idée

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de droit. Les actes de jouissance que l'on pourrait invoquer pour y fonder la possession et la prescription sont le plus souvent des actes de bon voisinage, c'est-à-dire de bienveillance, ce qui exclut tout droit et empêche par conséquent la prescription. celui qui jouit par tolérance n'a aucun titre, sauf un consentement du propriétaire, que celui-ci peut retirer d'un instant à l'autre."

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Laurent, t. 8, au No 210 :—"Mais est-il bien vrai qu'un chemin public, pratiqué à titre de servitude, exclut la tolérance ? Celui qui souffre un passage ne le fait pas toujours par affection pour celui à qui il permet de passer sur son fonds : la tolérance n'est pas l'amitié. On tolère bien des choses que l'on voudrait empêcher ; parfois on le souffre parce que on n'a aucun intérêt à s'y opposer ; parfois c'est pour se concilier la bienveillance des habitants. Peu importe après tout : la possession est présumée précaire, comme on le disait dans l'ancien droit, ce qui exclut toute prescription."

Au No 218, même auteur : "Il faut que la commune prouve que le chemin est public. Le fait que les habitants ont passé par le chemin ne suffit pas pour qu'il soit public, puisque le passage peut n'être qu'un passage de servitude, c'est-à-dire de tolérance, ce qui exclut tout droit et de servitude et de propriété ; il faut, comme l'a jugé la Cour de Cassation dans l'arrêt que nous venons de citer, "que la commune ait fait passer le chemin dans le domaine communal par une appropriation caractérisée." L'arrêt indique le genre de preuves que la commune devrait fournir : le creusement des fossés, l'empierrement et l'entretien du chemin aux frais de la communauté, l'érection d'un monument public, par exemple, d'une croix ; la circonstance que le chemin sert de communication entre deux communes ou de jonction entre deux chemins publics. C'est aux juges du fait à constater si la possession fait preuve de la propriété ou si ce n'est qu'un passage de tolérance. La jurisprudence des Cours de Belgique est conforme, en ce point, à celle des Cours de France ; en

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- “ droit il n’y a aucun doute, la difficulté ne concerne que la “ preuve.”
- Am. & Eng. of Law—Vo Dedication—*Vol. 9. pp, 21, 22.
- Definition of. . . . Express or implied.
- At p. 40 : “ The road, however, must be primarily for the “ benefit of the public ; no presumption of an intent to dedi- “ cate arises where the road is constructed for the convenien- “ ce of the owner of the land and the public is simply allowed “ the use of it without objection.— At p. 70. *Way originally “ private.* Where a way is clearly shown to have been open- “ ed as a private way originally, user of it by the public for “ many years in connection with those entitled to its use, and “ for whose benefit it was laid out, does not, as a general rule, “ show a dedication and establish it as a public highway.

Léveillé vs La Cité de Montréal (1) confirmé en appel. Remarques de Mathieu, J. (en révision) : “ La loi permet aux “ corporations municipales d’acquérir des rues par la prescrip- “ tion, pourvu qu’elles en jouissent pendant dix ans. Cette “ prescription ne commence pas à courir du moment de l’ouver- “ ture de la rue par le propriétaire du fonds, mais seulement du “ moment où cette rue est considérée comme rue publique par “ le public et par la corporation. Le fait que le public passe “ sur le terrain d’un individu pendant dix ans ne rend pas ce “ passage rue publique, si, outre le fait matériel d’y passer, “ l’intention de passer dans une rue publique ne s’y trouve “ pas” Motif du jugement en révision do p. 425 : “ Considérant que le propriétaire qui ouvre une voie de com- “ munication ou rue sur son terrain pour l’usage de ceux à qui “ il vend partie de ce terrain ne perd pas pour cela la propriété “ du terrain de la rue, et qu’il ne peut perdre cette propriété “ que par l’expropriation ou par la prescription telle que dé- “ crétée par la loi.”

(1) 1 C. S. 410, 4 Q. B. 210.

LACOSTE, J. EN C.:—"La distinction doit être évidente et "non équivoque"	1906
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<i>Chamberlund & Fortier</i> (5)	
<i>Lavertu vs Corp. de St Romuald</i> (6)	

ANDREWS, J. :—"The recent decision of the Supreme Court in Chamberland and Fortier shows that abandonment or dedication of a road to the public will not be easily presumed. In that case the owner of the land had obtained \$20 from the parish council and \$50 from the Provincial Government to aid him to open a road over his farm, on the representation of himself and others that it was of public utility in order to give settlers on lands in rear of it access to such lands. Yet the Supreme Court held not only that there was no consequent dedication of said road to the use of the public, but that there was none even in favour of the owners of said rear lands to which there was no other access by any public road. Against such assumed dedication Mr Justice Fournier, who gave the judgment of the Court invoked C. C. 407 :—"No one can be "compelled to give up his property, except for public utility "and in consideration of a just indemnity previously paid."

McGinnis et al. vs Létourneau et al. (7)

WURTELE, J.—Jugé:—"Que les propriétaires d'un chemin de tolérance ne peuvent être forcés de l'entretenir, ou de continuer de laisser le public s'en servir. A la page 281 :—"Considérant que si le dit chemin n'a été qu'un chemin de simple

(1) 2 Q. B. 266.

(2) 7 Q. B. 234.

(3) 7 Q. B. 290.

(4) 13 K. B. 52.

(5) 23 S. C. 377.

(6) 11 S. C. 254.

(7) M. L. R., 7 S. C. 278.

1906	"tolérance, régi par les articles 749 et 750 du code municipal,
Corp. of the	"les défendeurs comme les propriétaires du terrain où il passait
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Onslow	"retirer de l'usage du public, et qu'ils ne pouvaient être forcés
v.	"de l'entretenir et de laisser le public continuer de s'en servir.
McGough.	"Considérant que les défendeurs avaient le droit de fermer
Champagne,	"le dit chemin à volonté. "

The plaintiff made a motion for a rule *nisi* against the defendant alleging that the latter had refused to obey the interlocutory injunction issued against him. Though the defendant had signified to certain parties representing the plaintiff his intention not to obey the injunction, yet when notified of the same he complied with the said order within a reasonable time. This motion is dismissed without costs.

The action of the plaintiff is dismissed, and the interlocutory injunction issued against the defendant is rescinded and vacated with costs.

JUDGMENT IN REVIEW.

CHARBONNEAU, J., *dissentiens*.

Sur le fonds je serais d'opinion d'infirmier le jugement.

La corporation demanderesse a été pendant six ans en possession paisible, non équivoque et ni contestée du chemin que le défendeur s'est tout d'un coup avisé de fermer. Quelle qu'ait été l'origine de ce chemin, que ce soit la corporation elle-même, ou le défendeur ou son voisin Alexander qui en ait fourni le terrain, en tout ou en partie, qu'il y ait eu dédicace ou non par le défendeur et ses deux voisins, Alexander et O'Reilly, lorsqu'ils l'ont ouvert dans la réserve de la ligne de concession et dans la ligne entre le lot Nos 6 et 7, il reste un fait certain et incontesté : c'est que ce tronçon de chemin a fait partie de la voirie publique du grand chemin (*Main thoroughfare*) pendant six années précédant le trouble dont on se plaint.

Dans l'action possessoire il n'y a pas à aller au-delà. Ce serait plaider le pétitoire. Il suffirait de ce principe pour faire maintenir une action possessoire ordinaire.

La seule raison de douter serait que dans l'espèce l'action est intentée par une corporation municipale à qui la loi donne l'autorité de faire cesser elle-même ce trouble par ses officiers. Si cependant négligeant ce pouvoir, elle préfère s'adresser aux tribunaux par l'action de droit commun, la Cour Supérieure a juridiction et il n'y a pas lieu de lui en dénier l'exercice.

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TASCHEREAU, J. :—

My colleague, Mr Justice Pagnuelo and I are of opinion that there is no error in the judgment inscribed for Review and as we have nothing to add to the reasons given by the Honourable Judge in the Court below, we simply confirm it with costs.

Brooke, Chauvin & Devlin, for the plaintiff.

D. R. Barry, for the defendant.

SUPERIOR COURT.

MONTREAL, December 29th, 1906.

Present :—DUNLOP, J.

THE INCUMBENT & CHURCHWARDENS OF ST EDWARD'S CHURCH v. THE SYNOD OF MONTREAL.

Interpretation of Statutes—Incumbent of a parish of the Church of England in the Diocese of Montreal—Appointment by the Bishop during pleasure—Institution and Induction.

Held :— 1o. A clerk in Holy Orders of the Church of England appointed by the Lord Bishop of Montreal under his sign manual to be the incumbent of a parish during the pleasure of His Lordship, and therefore removable, is *the Incumbent* within the meaning of Section 6 of the Temporalities, Act of the United Church of England and Ireland in the

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Diocese of Montreal. As such, he forms, with the churchwardens of the parish, the corporation referred to in the above section.

20. An Incumbent of a parish need not be a Rector. He holds his office by virtue of his appointment by the Lord Bishop of the diocese and neither "*institution*" nor "*induction*" is required to invest him with the rights and powers pertaining to it.

DUNLOP, J. :—

The incumbent and churchwardens of the church of St. Edward, in the parish of St. Edward, and Diocese of Montreal, a corporation having its chief office and place of business in the aforesaid parish, in the City and District of Montreal, brings an action against the Synod of the Diocese of Montreal, a body politic and corporate, having its office and principal place of business in Montreal, in the District of Montreal as defendant, and His Grace the Right Reverend William Bennett Bond, Archbishop and Bishop of the Diocese of Montreal, a corporation sole, under the title of The Lord Bishop of the Diocese of Montreal, residing and having his principal office and place of business in the City of Montreal aforesaid, and the Very Reverend T. F. L. Evans of Montreal aforesaid, Dean of Montreal as *mis-en-cause*.

This action is brought to have two deeds of the St. Edward Church property declared null. The first is a deed from the Reverend Dean Evans to the Lord Bishop of Montreal of date the 4th March, 1901, and it is demanded that the said deed be declared to be illegal, null and void, or at any rate cancelled and annulled in so far as the same conveys or purports to convey any right or title to lot 1817 St Ann's ward, and the buildings thereon erected — the whole as described in the deed ; and also a deed alleged to be a pretended sale and conveyance from the Lord Bishop of Montreal to the Synod of the Diocese of Montreal of date the 14th February, 1902.

The defendant and one of the *mis-en-cause* attack the action by an exception to the form, based upon the alleged non-existence of the corporation.

The contention in point of fact upon which the exception is based is the alleged want of an incumbent, other than the Bishop of the Diocese.

It is in effect alleged in the exception, that the writ and declaration in this cause issued are informal, irregular, and incomplete, in that they do not detail or set forth the name or names of the party pretending to act as the incumbent of the parish, or of the churchwardens thereof, composing the corporation referred to in the writ and declaration ; that the writ and declaration disclose no authority for the institution of the action by the parties, thereby pretending to act as incumbent and churchwardens of St. Edward church ; that as a matter of fact no incumbent within the meaning of the law and of the practice of the Church of England in Canada, has been appointed or legally exists in respect of the said parish of St. Edward, other than the Lord Bishop of the diocese in his capacity of chief pastor of the whole Diocese of Montreal ; that at the time of the institution of the present action, no corporation, such as is mentioned and declared in the plaintiff's declaration, legally existed within the meaning of the law and of the practice of the Church of England in Canada ; that the Lord Bishop of Montreal has never authorized or permitted the institution of the present action ; that the parties, whoever they may be, acting in the present suit under the name of the incumbent and the churchwardens of the parish of St Edward, have no capacity or quality to act ; that the present action is wholly irregular, unauthorized and unfounded and its dismissal is prayed for with costs.

The plaintiff was allowed to answer this pleading in writing , and in effect alleged that the allegations of the exception were unfounded in law and irrelevant ; and further prays *acte* of the admission made in paragraph 3 of the *mis-en-cause*, Dean Evans ; and alleges, that this paragraph was untrue and unfounded, inasmuch as by license and appointment duly made by the Lord Bishop of Montreal on the 8th March, 1901, in accordance with the law and practice governing the Church of England in Canada, in the Diocese of Montreal, the

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Reverend William Saunders, Rural Dean of St Andrews, was appointed incumbent of St. Edward's church and of the parish of St. Edward, the whole as would appear by a certified copy of the license filed as plaintiffs' exhibit 4 ; that since the 8th March 1901, he, the Revd William Saunders, has continuously acted as the incumbent of the church and parish in question, performing all the duties as such ; that as such incumbent he has, on divers occasions in the course of that period, since the 8th March 1901, been officially recognized and received by the Lord Bishop of Montreal, in the Synod of the diocese and other like manner, but the precise dates and occasions the plaintiff is unable to give ; that more particularly by letter missive of the Bishop Coadjutor of the Diocese of Montreal, of date the twenty-eighth day of March 1906, he was officially recognized as the incumbent of the church and parish in question, as will more fully appear on reference to a copy thereof filed as exhibit number 5 of the plaintiff ; that at the time of such letter the Bishop Coadjutor was acting as the Lord Bishop of the diocese, during the incapacity of the diocesan.

And the plaintiff further alleges that the corporation then consisted of him, the Reverend William Saunders, as incumbent, Henry Walsh of Montreal, foreman, and Frederick R. Clark, of Montreal aforesaid, although the plaintiff does not thereby admit any obligation to give the names and designations of the persons composing such corporation.

The plaintiff denies the other allegations of the exception, and prays its dismissal with costs.

The plaintiff answers the exception upon argument in law and in fact, and contends that the facts establishing a corporation may be briefly recited as follows :

The parish of St. Edward became so in virtue of a decree of the bishop of the diocese, ratified by the Synod and appearing as Decree No VIII, p. 53, of D2.

Shortly after this decree had been promulgated and approved on the 8th March, 1901, the bishop nominated and

appointed the Rev. William Saunders the incumbent during his pleasure, of the church and parish of St. Edward. This appointment was made as follows :

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"I hereby nominate and appoint the Reverend William Saunders, B. A., Rural Dean of St Andrews, to be the incumbent, during my pleasure, of the church, heretofore known as St. Stephen's Church but now and hereafter to be known as St. Edward's church, in the parish of St. Edward, in this city, and I hereby authorize him forthwith to keep registers of all baptisms, marriages and burials occurring within said parish of St. Edward, in connection with said church of St. Edward. And I hereby instruct and require him to hand over and deliver to the Venerable Archdeacon Evans, the Rector of the parish of St. Stephen in this city, all registers of acts of Civil Status, minute books of vestry meetings, and other records and documents, presently forming part of the archives and muniments of said St. Stephen's church." Montreal 8th March, 1901 (Sd) W. B., Montreal."

Since that date Mr Saunders has publicly exercised his office as incumbent, officiated in all the services of the church, presided at meetings of the Vestry, and corporation, been received in the Synod generally, and in all respects been the recognized and accepted incumbent of the church and parish.

In virtue of his office, he and the churchwardens claim the status and style of a corporation under the provisions of section 7 of the Temporalities' Act, p. 81 D1 and, as such, have held and administered the temporalities of the church for upwards of five years past.

Upon an exception to the form, the Court is asked to ignore and deny the existence of the public corporation.

According to Art. 355 C. C., the plaintiff is a public corporation existing *de jure* in virtue of a public act, sec. VI of the Temporalities' Act (p. 81 Ex. D1). It is in the free, open and public use of its corporate name and rights, and its status and existence cannot be called in question by any third and private persons such as the defendant and *mis-en-*

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The defendant argued that the plaintiff was not a *de facto* Corporation. If not *de facto* it is *de jure* or perfect in its legal existence and authority. But admitting all that is argued against the existence of the corporation, it is at least in the light of a public statute, the appointment of the Rev. William Saunders as incumbent, as mentioned hereafter, and its open and unequivocal exercise of the privileges and duties of a corporation, at least, a *de facto* corporation.

As to what constituted a distinction between a *de facto* and a *de jure* corporation, the plaintiff cites 10 Cyc. p. 252 concluding as follows :—

“(1) A charter or statute under which a corporation with the powers assumed might have been organized.

“(2) A *bona fide* attempt to organize a corporation under such a charter or statute.

“(3) An actual user of the corporate powers, or some of them, which might have been rightfully used by such an organization.—Such being the proper conception of a corporation *de facto*, it follows that a substantial compliance with the law in effecting a corporate organization is not necessary to constitute the body a corporation *de facto*, because that makes it a corporation *de jure*.”

Even supposing the whole question to be narrowed down to the enquiry whether the Rev. Wm. Saunders is incumbent of St. Edward's or not, the following considerations might be noted :

1. That the “Incumbent” whether missionary, rector, or otherwise, is *de facto* a member of the corporation, sec. VI.

2. That absolutely no authority exists for the contention that the incumbent of a rectory must be a rector. If he is a rector, then he is immovable to all intents and purposes. If he is not, then he holds office at the will of the bishop.—Now the word “Incumbent” according to the Imperial Dictionary, implies temporality, but otherwise has a very extended

meaning, viz : "a person in present possession of a benefice or "any office." Possibly a more authoritative definition will be found in Brice's Law of Public Worship, where according to the Imperial Act, 37 & 38 Vict. ch. 85 it is stated "The term "Incumbent" means the person or persons in holy order legally responsible for the due performance of divine service in "any church, or of the order for the burial of the dead in any "Burial ground" or that an "Incumbent must be an ecclesiastic and charged with ecclesiastical duties, under the law."

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The whole argument of the defendant was directed to establish that the Revd William Saunders was not "Rector" of the Parish of St. Edward. Rector in the sense of having been appointed in strict accordance with the formalities of Canon XXXV, being immovable by the bishop, he certainly is not. The question is not that, however, but whether he is "Incumbent" according to the meaning of the Temporalities' Act.

Now, the argument of the defendant rests upon three hypotheses, (a) that the parish of St. Edward is a rectory in the sense intended by Canon XXXV, (b) That only a "Rector" can be the "Incumbent" of such a parish; and (c) that such Rector must be appointed according to the provisions of Canon XXXV, and must be both "instituted" and "inducted" according to certain rubrical formulæ.

The theory of St. Edward's being a rectory rests upon implication merely. True it is a subdivision of the original parish of Montreal, which might appear to have been so constituted under letters patent from the Crown, although as to this there is no direct evidence whatever. But even supposing it is a subdivision of a parish so created, there is nothing whatever to show what its status as such is, beyond the various provisions of Canon V. True the special qualifications of a rectory, according to section 3 of that Canon, could not apply to such a subdivision; but there is nothing to prevent any such subdivision being a mission according to section 1, or a parish within the terms of section 2. Decree number VIII constituted it a parish simply, and it fails to provide within

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itself either a stipend, according to section 5, or the whole of the stipend that is paid. There is nothing to show what are the special attributes and status of parishes established by letters patent, or subdivisions of them. There is the negative provision of section 3 of Canon V and nothing more. It must be assumed that all the remaining Canons and part of Canon V apply equally to such parishes and subdivisions. That the subdivisions, at least, are very much assimilated to all other parishes is quite apparent from section 3 of Canon XXXVI, where it is expressly provided that the Temporalities' Act shall apply to the "Incumbent" of such parishes. True the Synod when confronted with its own Canon argued that it was *ultra vires*; a naïve conclusion surely, that it may take advantage of its alleged fault and abuse of powers. But the terms of the act 35 Vict. ch. 19, p. 78, clearly gives a discretionary power.

The determination of this subtle point is not necessary in view of the express provisions of the Temporalities' Act itself, so far in any event as the present subject of dispute is concerned. The act provides.

"...and it is hereby enacted by the authority of the same, that from and after the passing of this act, the soil and freehold of all churches and chapels of the communion of the said Church of England in Canada now erected or hereafter to be erected in the said diocese of Montreal, and of the church yards and burying grounds attached or belonging thereto respectively, shall be in the parson or other incumbent thereof, for the time being, and the churchwardens to be appointed as hereinafter mentioned by whatever title the same may now be held, whether vested in trustees for the use of said church, or whether the legal estate remains in the Crown by reason of no patent having been issued, though set apart for the purposes of such church or chapel, church yard or burying ground."

Nothing could be more conclusive: Then follows the solitary exception:

" Provided always, that nothing in this section contained
 " shall extend to affect the tenure of any parsonage or rec-
 " tory now established by letters patent, or of any propieta-
 " ry church or chapel. "

The words "Parsonage" or "Rectory" should be noted.

As the act is dealing with lands and buildings, it is clearly land and buildings here intended. The use of the words "Te-
 nure" "Parsonage" and "Proprietary Church or Chapel" gives
 this conclusion unmistakable emphasis. The logical result of
 the clear and emphatic language of the act is therefore evi-
 dent, viz :

" . . . That the soil and freehold of all churches and chapels
 " anywhere and everywhere in the diocese are vested in the
 " incumbent for the time being and the 'churchwardens',
 exactly the case contended for here, for it is abundantly
 evident from the Harris deed, that the property in question
 is not a "Parsonage or Rectory", neither a "Proprietary Church
 or Chapel."

Assuming that the defendant has established his first hy-
 pothesis, viz : "That St. Edward's is a rectory or self sustain-
 " ing parish does it follow that the incumbent must be a
 " rector appointed under the provisions of canon XXXV ?"

Apart from this canon we have no special directions as to in
 whom the authority of appointments is vested. One thing is
 abundantly clear, however, and that is that the appointment
 even of a rector, lies in the bishop's hands, and that this ca-
 non XXXV gives merely a qualified right of selection to the
 vestry. As to the appointment of any other incumbent there
 can be no question as to the absolute discretion and authori-
 ty of the bishop, both in the appointment and removal. This
 is clear from the evidence of canon Baylis, Rev. Mr French
 and Rev. Mr Doull, the first-named of whom is brought
 forward as an expert or interpreter of canonical rule and
 practice.

Providing St. Edward's is a rectory or self-sustaining pa-
 rish, then the appointment by the bishop of a rector without
 reference to the vestry might be *ultra vires* under canon

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XXXV. But there is no pretence whatever that the Rev. Wm Saunders is more than what his appointment makes him, viz : "Incumbent during the bishop's pleasure." The conclusion is irresistible that the bishop was acting within his powers as diocesan, and this is further fortified by the evidence of canon Baylis that in so appointing Mr Saunders, the bishop was acting *intra vires*, and the admission made by the defendant's counsel at bar that the bishop had not only the right but was in duty bound to provide for the spiritual care of the parish as he did. Now, as has been shown, an "Incumbent" holds a spiritual office. The bishop could confer no more on him, the Temporalities' Act making provision, entirely beyond the bishop's powers and jurisdiction, as to the temporal things of the charge. There is no distinction between incumbents of one sort or another, removable or otherwise, for the act expressly says "the incumbent for the time being."

Moreover, even had the bishop acted beyond his powers in thus appointing Mr Saunders, the usurpation would have been entirely in the matter of the rights of the vestry, which has accepted the appointment and supported the appointee in his office. Surely in this case it is hardly competent for a third party, an outsider, to deny the validity of the appointment, thus arrogating to itself the rights and recourse of the vestry alone.

We come now to the hypothesis based upon the mystical and mythological "Institution" and "Induction." The solitary foundation upon which the idea of a ceremonial can be erected is in the use of the expression "Institution of the said rectory" in Canon XXXV. If we are to accept this expression as intending a liturgical service of some kind it is by the context clearly applicable to rectors alone. In that case missionaries and other removable incumbents would not be affected by its use. The plaintiff, however, contends that the word "Institution" as employed in the canon, does not imply anything more than its common and customary sense of an appointment to office.

Of the word "Induction" we have not a vestige in canon

XXXV, nor anywhere else, in the constitution and canons of the diocese. Yet, it has been seriously contended that, not only should Mr Saunders have been "instituted", but "inducted" as well. Taking these two words in their purely ceremonial meaning, "Institution" refers to the "act or ceremony of investing a clerk with the spiritual part of a benefice." Likewise it would appear that "Induction" refers to the act or ceremony of investing a clerk with the temporalities of a benefice. Both are public presentations and survivals of forms and ceremonies attending a public and personal entry into office. Authority has been cited which may be pertinent under the law and practice of the Church of England, but is not legal or authoritative proof of rules or practice governing a private body such as the Church of England in Canada within itself. This authority is to the effect that, in England, importance is attached to "Institution and "Induction" as a means of completing the vesting of the rector or vicar.

The question in the present case is how far are ceremonials of this kind essential to the due installation of an incumbent under the law and practice of the Church of England in Canada. The plaintiff submits that, before any ceremonial can be regarded as essential in point of church doctrine and practice, it must be founded upon strict canonical enactment proceeding from competent authority, or unbroken and invariable practice giving it the full sanction of inviolate usage. Neither can be found in respect of the law or practice governing the Church of England in Canada, and particularly in the Diocese of Montreal. The word "Institution" occurs only in the XXXVth canon, absolutely no ceremonial or form thereof anywhere appears, and falling back upon the constitution, etc, of the Synod of the Province of Canada, there is nothing more than a form of service which *may* be used. In order to make the forms of institution and induction appear obligatory, counsel for the defendant was compelled to have recourse to such law and practice as might exist in respect of the Church of England and to find a means of applying them to the Church of England in Canada. Recourse is first had to the declaration ap-

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pearing on page one of the constitution, etc, of the Diocese of Montreal, and which reads as follows :

“ We desire that the church in this diocese shall continue as it has been, an integral portion of the United Church of England and Ireland ; and we declare our firm and unanimous resolution, in dependence on divine aid, to preserve those doctrines and that form of church government which are at present recognized by the Church of England and Ireland. ”

But that this had nothing to do with the temporalities of the church is evident from what follows, viz :

“ It is our earnest wish and determination to confine our deliberations and actions to matters of discipline, to the temporalities of the church, and to such regulations of order as may tend to her efficiency and extension ; and we desire no control or authority over any but those who are or shall be members of our own church. ”

What is therefore abundantly clear is that the resolution refers to the preservation of matters of faith and doctrine, and the forms of church government by the three orders of bishops, priests and deacons. Referring to the constitution, etc, of the Synod of the Province of Canada, we find a similar but enlarged declaration, which is as follows :

“ We desire the church in this Province to continue, as it has been, an integral portion of the United Church of England and Ireland. ”

“ As members of that church, we recognize the true canon of the Holy Scripture as set forth by that church, on the testimony of the Primitive Catholic Church, to be the rule and standard of faith ; we acknowledge the book of common prayer and sacraments, together with the thirty-nine articles of religion, to be a true and faithful declaration of the doctrines contained in Holy Scripture ; we maintain the forms of church government by bishops, priests and deacons, as scriptural and apostolical ; and we declare our firm and unanimous resolution, in dependence of divine aid to preserve those doctrines and that form of government, and to transmit them to our posterity. ”

Here it is abundantly shown what is meant, and that even at that time, when the various dioceses in Canada believed themselves to be as integral portions of the United Church of England and Ireland as the diocese of London or Dublin, it was evidently realized that the whole constitution, administration and practice of that church, in temporal things as well as spiritual, could not be transplanted to the self-governing soil of Canada.

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Now upon these declarations and upon them alone can the defendant found an argument of any sort whereby it would appear that the practice, forms and ceremonial of England are obligatory in Canada. But not only do the declarations expressly exclude temporal things, they are without practical effect, in any respect, being made not as an act of voluntary submission or union with United Church of England and Ireland, but under the mistaken belief that the dioceses and provinces of Canada were mere parts of that church. In other words, not an adoption of faith or practice to govern in the future, but an affirmation of a wholly erroneous conception. Not only was the Church of England, as it then was in Canada, not an integral portion of the United Church of England and Ireland, cut off by later legislative enactment, but it never was part. —In the famous "*Colenso*" case (1) it was decided "As no Ecclesiastical Tribunal or jurisdiction is recognized in a colony or settlement, where there is no established church, the Ecclesiastical Law of England cannot be treated as part of the law which settlers carry with them from the mother country."

P. 148. "The United Church of England and Ireland is not a part of the constitution in any colonial settlement, nor can its authority or those who bear office in it, claim to be recognized by the law of the colony, otherwise than as members of a voluntary association."

We must therefore look to the canons and practices of the

(1) Moore P. C. C. N. S. P. 115.

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Church in Canada, first in the several dioceses, next as provided by the Provincial Synod, and lastly by the recently formed Synod of the entire Church of England in Canada, for each diocese was at first, in matters of faith, at least an absolutely independent church.

In the face of this, the fact becomes of small moment, though otherwise of prime importance, that the United Church of England and Ireland has ceased to be since the Disestablishing Act of 1869, and that no evidence has been produced as to what its doctrine and practice may have been, apart from what may be established by these declarations. It therefore is of small moment what may be the practice of the Church of England in respect of "Institution" and "Induction," for it is without precedent or effect in Canada. If further argument is needed to demonstrate this, we find it in the absolute and essential differences of that church from the Church of England in Canada in everything outside of the prayer book. A rector in the Church of England, for instance, is "the person" who is invested during life with the freehold of the parsonage and other church property." A vicar is but a slightly qualified rector, and in this sense we have no rectors or vicars in Canada.

A reference to the authorities cited by the defendant regarding institution and induction shows clearly that these are the acts of the spiritual superior, the bishop, in completing the vesting of persons appointed by patrons to the living or cure. They appear to take the form of venerable ceremonials, but are nothing more than evidence of the reserve authority vesting in the bishop, and his willingness to exercise it on behalf of the person instituted and inducted. In the present case the full authority rested with the bishop and he has exercised it publicly by his act of nomination and appointment. In other words there is no sacramental form of investment, and it flows from the episcopal appointment of March 8th, 1901 followed by public possession and recognition that Mr Saunders is incumbent of St. Edward's and as such vested with the wardens, by the Temporalities' Act, in the temporalities of the church.

We might now consider the steps taken by St. Edward's to obtain the appointment of a rector. Surely there is nothing incongruous in a parish whose incumbent is so, merely at the pleasure of the bishop, in thus seeking to obtain the permanency of a rector. That it was not competent to make this request before is evident by the resolution as to salary and security contained in the minute, which is the first justification put forward of the desire of the parish to obtain the rank and privileges of a self-sustaining parish. The defendant agreed that the resolution is an admission that Mr Saunders is not a rector. Unquestionably it is, as it is an admission that the parish is not a rectory or a self-sustaining parish. But at the very opening of the proceedings, Mr Saunders appears in the chair as incumbent, and that he was and is incumbent beyond all cavil or dispute. If not then what ? There is nothing more to be contended for than the incumbency of the Rev. Mr Saunders ; and it is clear that nothing whatever has been adduced in proof or argument to justify this Court in divesting him of office, much less ignore him. He is expressly named and appointed incumbent by the mandate of the one competent authority, the bishop of the diocese. As such he has been admitted and received in the Synod and made a member of its Executive Committee. For years past he has publicly officiated in the church of St. Edward, presided over its corporation, parochial affairs and assemblies. His incumbency has been made the reason of the bishop in refusing to appoint a rector.

I am aware that there have been differences of opinion as to the effects of the Colenso judgment on the status of Church of England in Canada.—Whatever may be the effect of that judgment I am of opinion that the plaintiff has clearly demonstrated that it flows from the episcopal appointment of March 8th, 1901, followed by public possession and recognition, that the Reverend Mr Saunders is the incumbent of St. Edward, and as such vested with the Wardens by the Temporalities' Act in the temporalities of the church.

I may say that I adopt the views of the plaintiff's counsel

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as set forth in their factum filed as an able exposition of the law governing the present case.

I certainly would not attempt to divest the Reverend Mr Saunders of his office in view of the fact that he has been expressly named and appointed incumbent by the mandate of the one competent authority, the bishop of the diocese, and that he has been admitted and recognized in the Synod and made a member of its Executive Committee, and has publicly officiated in the church of St. Edward for many years, presided over its parochial affairs and assemblies; kept the registers, officiated at marriages, baptisms, and burials—unless it had been demonstrated beyond all reasonable doubt that he had been illegally appointed, which in my opinion has been nowhere shown in the present case.

I am of opinion that the action has been well brought by the plaintiff as a body corporate, and consequently the motion in the nature of an exception to the form, is dismissed with costs.

Hibbard & Orr, for the plaintiffs.

L. H. Davidson, K. C., for the defendants.

COUR SUPÉRIEURE

MONTREAL, 31 octobre 1906.

Présent :—FORTIN, J.

THE MONTREAL BREWING COMPANY v. LA CITÉ DE MONTRÉAL & LA COMPAGNIE DU CHEMIN DE FER DU PACIFIQUE.

*Responsabilité—Administration municipale — Fermeture
des rues—Dommages causés aux propriétaires riverains.*

Jugé :—Les municipalités, en exerçant le droit de fermer les rues ou voies publiques, sont responsables des dommages causés aux propriétaires riverains par la plus grande difficulté d'accès à leurs immeubles.

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Cette cause de la Montreal Brewing Co. contre la Cité de Montréal et la Compagnie du chemin de fer du Pacifique, intervenante, présente une question de droit et l'appréciation d'une preuve volumineuse.

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Les faits principaux qui ont donné lieu à la poursuite sont bien connus.

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Dans le cours du printemps 1905, la défenderesse, pour permettre à l'intervenante d'agrandir son terrain au sud-est de la gare Viger, convint avec elle, par acte devant notaires, de supprimer certaines rues et parties de rues, savoir, partie de la rue des Commissaires; la rue St Timothée et plusieurs autres rues parallèles à cette dernière et d'en louer le terrain à la compagnie pour un terme de quatre-vingt-dix-neuf ans.

Un règlement avait été d'abord adopté pour autoriser la ville à conclure ce traité.

Les parties à l'acte étaient dans le doute de savoir si un bail de cette nature pouvait être consenti par la cité, sans autorisation spéciale de la Législature; mais il fut décidé de passer outre, quitte à obtenir plus tard cette autorisation, ainsi que la ratification du contrat de bail à la compagnie du Pacifique, par un acte de la Législature.

La demanderesse occupe, pour sa brasserie et accessoires, presque tout le côté sud-ouest de la rue Saint Timothée, depuis la rue Notre-Dame.

La rue Saint Timothée aboutit à celle des Commissaires qui est à angle droit venant de l'est et continuant vers l'ouest le long de la voie du Pacifique, entre les hangars de cette compagnie, au nord, et son élévateur de grain au sud.

Par les changements prévus au règlement, la partie de la rue des Commissaires, depuis la rue Saint Timothée jusqu'à la rue Panet, de même que toutes les rues transversales, c'est-à-dire celles qui étaient parallèles à la rue Saint Timothée, depuis cette dernière inclusivement, jusqu'à la rue Panet du côté est, ont été supprimées.

L'action de la demanderesse est en recouvrement des domma-

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ges qui lui sont causés par la fermeture de ces différentes voies de communication. Elle les évalue à la somme de \$6,600.00.

La rue Saint Timothée et la rue des Commissaires, ainsi que toutes les rues transversales qui ont été fermées, donnaient accès de l'établissement de la demanderesse à toute la partie est de la cité, et il a été prouvé d'une façon assez satisfaisante qu'environ les trois quarts des produits, de la bière, etc, de la demanderesse, s'écoulaient de ce côté.

La rue Saint Timothée elle-même est de peu d'importance pour le public en général. Elle n'est pas très longue et offre une pente très forte de la rue des Commissaires en montant vers la rue Notre-Dame, au point que les fourgons, les voitures chargées n'y passaient presque jamais. Le gros trafic faisait nécessairement un détour et ne pouvait guère en user pour avoir accès à la rue Notre-Dame.

Depuis la fermeture des rues en question les voitures de la demanderesse doivent sortir de la rue des Commissaires, traverser la voie du Pacifique, se diriger vers l'ouest jusqu'à la rue Berri pour aller de cette dernière rue à la rue Craig et, par celle-ci, revenir sur leurs pas pour se rendre dans les quartiers de l'est de la ville.

La demanderesse allègue qu'il lui a fallu, en conséquence, augmenter considérablement son matériel de roulage et, de ce chef, elle encourt une dépense additionnelle de \$22.00 par jour suivant les états qu'elle produit.

Le montant de son action représente les frais ainsi causés depuis la fermeture des rues jusqu'à l'institution de l'action le 9 septembre 1905.

La défenderesse a plaidé en substance qu'en fermant les rues, elle n'avait fait qu'user du droit qu'elle tenait de sa charte, que l'exercice de ce droit ne pouvait, en aucune façon, engager sa responsabilité et subsidiairement, elle nie que la demanderesse ait souffert les dommages dont elle se plaint.

Celle-ci a produit une réponse et après contestation liée la demanderesse a, par *retraxit*, réduit à deux mille piastres (\$2,000.00) le montant de sa réclamation pour les dommages qui couvrent la période comprise entre le 19 juin et le 9 septem-

bre 1905. Puis, une quinzaine de jours après, elle a fait une demande incidente en recouvrement \$5235. dommages soufferts depuis le 9 septembre, date de l'institution de l'action.

Le principal item de ces dommages, quatre mille et quelques cents piastres, est fondé comme ce qui fait presque entièrement l'objet de la demande principale, sur l'obligation où se trouve la demanderesse de faire un roulage beaucoup plus considérable, ainsi qu'il a déjà été expliqué.

A cet item elle ajoute trois nouveaux chefs :

D'abord la vente du grain qui a servi à la fabrication de la bière ; ce grain qui est très recherché par une certaine classe de clients, trouve beaucoup moins d'acheteurs à cause de la difficulté d'accès à la brasserie.

La demanderesse estime à \$200.00 les dommages qu'elle en souffre.

En deuxième lieu, elle réclame \$350.00 pour dépréciation de valeur, de voitures, harnais, etc.

Enfin, \$25.00 à raison de la difficulté additionnelle qui lui est causée dans le transport de déchets, fumier, etc, hors de son établissement.

La défenderesse a invoqué, à l'encontre de cette demande incidente, en substance, les mêmes moyens qu'à l'encontre de la demande principale.

Il convient d'observer que la demande incidente a été produite après la passation de l'acte de la Législature 6 Ed. VII, ch. 47, (Qué.) sanctionnée le 9 mars 1906. Par cette loi, la convention intervenue entre la défenderesse et l'intervenante, le 30 juin 1905, touchant la fermeture des rues dont il est parlé ci-haut et la location du terrain qui les formait, a été ratifiée mais par la troisième section de l'acte, l'intervenante est déclarée responsable des dommages qui peuvent en résulter, et le recours des propriétaires est ouvert contre la compagnie, contre la cité ou contre l'une et l'autre conjointement.

La compagnie du Pacifique a produit deux interventions, l'une pour contester la demande principale et l'autre pour contester la demande incidente. Elles font valoir toutes deux, en substance, les mêmes moyens.

La demanderesse, naturellement, a contesté ces interven-

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tions. Tout en reconnaissant que la compagnie a le droit d'intervenir, elle insiste sur son droit aux dommages qu'elle réclame et fait la réserve du recours que lui donne le statut cité plus haut.

Après contestation liée, les parties ont procédé à l'enquête et fait une preuve assez volumineuse au soutien de leurs prétentions respectives.

La demanderesse prétend d'abord que la défenderesse a admis sa responsabilité pour les dommages réclamés dans l'action principale, dans le contrat même intervenu entre elle et la compagnie intervenante. Ce contrat contient la stipulation suivante : " The said Railway Company shall be liable for " all damages which may be caused to any persons or property by reason of the closing of the said streets, ramp and " portion of streets or alterations in the levels thereof, and " shall also indemnify and hold harmless the city against any " suit instituted, judgment rendered or claim recognized as well " founded against the city, including capital and costs as the " case may be, etc. "

La demanderesse prétend voir dans cette clause l'admission ou la reconnaissance de l'existence des dommages qu'elle réclame et son avocat a même soutenu, en plaidant, qu'il s'y trouve une délégation de paiement de ces dommages à la compagnie intervenante.

A proprement parler, elle ne contient aucune délégation de paiement, mais une simple convention de garantie surbordonnée à la condition de l'existence des dommages. Le droit, à ceux-ci, repose sur les règles de droit commun, applicables en pareils cas.

La demanderesse émet des prétentions analogues relativement à l'effet de l'Acte de la Législature sur sa demande incidente. Elle dit que l'acte en réservant aux propriétaires lésés les recours qu'ils peuvent avoir, a, par là, même reconnu le droit aux dommages réclamés par l'action.

Cette prétention n'est pas plus fondée que la première.

Dans l'un et l'autre cas, qu'il s'agisse de la demande principale ou de la demande incidente, les mêmes règles de droit doivent s'appliquer et fournir une solution identique.

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La première question à décider est de savoir si un propriétaire riverain a un recours contre la municipalité qui supprime la rue à laquelle son immeuble est contigu.

La défense a cité à l'appui de la négative, trois jugements, dont un du Conseil Privé, dans les causes de *Drummond vs La Cité de Montréal* ⁽¹⁾, *Morrison vs La Cité de Montréal* ⁽²⁾ et *Robillard vs La Cité de Montréal* ⁽³⁾.

J'ai examiné ces autorités avec autant de soin que possible à cause de l'importance du sujet et je suis arrivé à la conclusion qu'elles ne règlent pas la question définitivement.

Dans la cause de *Drummond* on avait fermé la rue Saint Félix à une de ses extrémités et immédiatement après le demandeur avait pris une action en dommages, réclamant en même temps une injonction, pour le motif que la ville n'avait pas le droit de fermer une rue à une de ses extrémités, sans avoir au préalable indemnisé ceux à qui il pouvait en résulter des dommages.

Après avoir été jugée en première instance et en appel par les tribunaux de la province, cette cause est arrivée au Conseil Privé qui a décidé tout simplement que l'action avait été prise avant que les dommages réclamés eussent été causés ; que la cité ne pouvait être condamnée à payer des dommages qu'en vertu d'un statut permettant l'expropriation et prescrivant la fixation des dommages par arbitrage.

Il suffit de lire la conclusion, la fin de ce jugement pour se rendre compte de ce qui a été jugé, savoir, que dans l'espèce, le demandeur n'avait pas droit à l'action qu'il avait prise ; que les *dommages spéciaux* qu'il réclamait ne pouvaient lui être dus qu'en vertu d'un statut spécial et non de droit commun.

Dans la cause de *Morrison*, le jugement de la Cour d'Appel ne me paraît pas avoir été plus loin. M. le juge Ramsay, dont les notes témoignent d'un travail très soigné, après avoir examiné et approfondi la question à tous les points de vue et comparé le point qu'il avait à décider avec celui dans la cause de *Drummond*, est arrivé simplement à la conclusion que l'action devait être renvoyée, parce que les dommages réclamés n'étaient pas prouvés.

Dans la cause de *Robillard* il s'agissait d'un riverain qui se

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plaignait de ce qu'en expropriant la partie nord de la rue Notre-Dame, la cité avait fait preuve de négligence et avait laissé des débris et matériaux sur la rue trop longtemps.

La Cour d'Appel a décidé, en substance, que le ville devait agir dans un cas semblable avec diligence ; qu'il était bien vrai que deux hivers s'étaient écoulés sans qu'on eût rien fait pour débarrasser la rue, mais enfin, que le demandeur n'en avait pas souffert de dommages.

Ces précédents ne me paraissent pas, de même qu'ils ne pouvaient pas, déroger au droit commun.

Il s'agit ici tout simplement d'une question de responsabilité et de l'application de l'art. 1053 du Code Civil. La question qui se présente, je le répète, est celle de savoir si un propriétaire riverain d'une rue peut réclamer de la municipalité qui ferme cette rue les dommages causés par la plus grande difficulté d'accès à son immeuble.

Les auteurs sont unanimes à reconnaître l'affirmative. Un arrêt de la Cour de Cassation de juillet 1836 a définitivement réglé le point.

On lit dans Dalloz, Répertoire Vo Propriété, No 151 : "Le "principe de l'inviolabilité de la propriété proclamé par l'art. "545 C. Civ., doit être toujours religieusement observé, sauf les "cas d'exception spécialement prévus par la loi.
"Il a été jugé, en ce sens, que, bien qu'il appartienne aux vil-
"les de supprimer une rue et d'en aliéner le terrain, ce droit
"ne peut être néanmoins exercé qu'à la charge d'indemniser les
"riverains du dommage que cette suppression peut causer à
"leurs propriétés, et spécialement de la privation de leurs en-
"trées et sorties sur la voie publique". Du 5 juillet 1836, C. C.
ch. civ.

Laurent, Vol 7, par. 132 et 133, après avoir discuté les droits respectifs des municipalités ou plutôt de l'État et des propriétaires riverains, conclut ainsi : "Nous ne contestons pas le
"droit de l'État ; mais à côté du droit de l'État, il y a le droit
"des riverains ; l'État peut supprimer les vues et les issues, si
"l'intérêt de la voirie l'exige, mais il ne le peut qu'en indem-
"nisant les riverains. "

Les savants avocats de la défense m'ont cité les Pandectes

Françaises, Tome 58 Vo Travaux publics, mais à l'endroit même de leur citation, je trouve ce qui suit : No 2500. "Tout d'abord, il y a dommage ouvrant droit à indemnité, toutes les fois que le riverain d'une voie publique se voit privé des facultés de jour auxquelles il a droit."

No 2502.— "D'une façon générale, le trouble apporté aux droits généraux que possèdent tous les riverains des voies publiques, constitue un dommage dont il est dû réparation ; il n'est point nécessaire que le riverain justifie de l'existence à son profit d'une véritable servitude".

No 2538.-- "L'indemnité peut être légitimement réclamée quand les conditions d'accès sont transformées au point de ne plus rendre l'immeuble accessible aux voitures comme il l'était auparavant".

No 2539.-- "C'est ce qui a été décidé à l'égard d'un établissement commercial, situé en bordure d'une rue que les travaux avaient transformée en impasse."

Au No 2548, l'auteur reconnaît que la jurisprudence ne considère pas de plein droit, comme ouvrant un droit à indemnité, la fermeture d'une voie publique à une de ses extrémités, alors que l'autre extrémité restait libre.

Puis il continue :—

No 2549.-- "Toutefois, la solution nous paraît, en pareille matière, susceptible d'être influencée par les faits ; *il est évident que, si l'augmentation de parcours se trouvait définitivement consacrée et était considérable, il y aurait lieu à indemnité*".

C'est absolument ce qui se présente en cette cause. Voilà pour le droit commun. Le droit du demandeur à ces dommages me paraît indiscutable.

Quoique l'acte de la législature que nous avons cité ne puisse pas être interprété comme une reconnaissance du droit particulier de la demanderesse en cette cause, ainsi que nous l'avons déjà expliqué, il contient en termes exprès et formels, celle du droit en général des propriétaires lésés par la fermeture des rues, de se faire indemniser des dommages qu'ils souffrent.

De ce qui précède il faut conclure que la demanderesse est

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bien fondée en droit à poursuivre contre la défenderesse la réparation des torts que la fermeture des rues lui fait subir.

La question de fait, la preuve des dommages et la fixation de la somme à laquelle ils s'élèvent, offrent quelques difficultés.

Il est incontestable que le long détour que doivent prendre les voitures de la demanderesse, en conséquence du nouvel état de choses, lui cause un préjudice très sérieux.

Sans entrer plus dans les détails, j'arrive à la conclusion que pour la période à laquelle s'applique l'action principale, les dommages soufferts s'élèvent à la somme de \$252.50.

Pour celle à laquelle se rapporte la demande incidente du 9 septembre 1905 au 3 mai 1906, environ huit mois, on a fait une preuve qui me paraît exagérée. Estimant à \$3,000.00 par année les dommages soufferts par la difficulté d'accès à la brasserie, je crois rendre justice en accordant \$2,000.00 pour cette période, qui forme les deux tiers de l'année.

A cet item j'ajoute \$100.00 qui me paraît une indemnité raisonnable pour la perte de la vente du grain.

Pour frais additionnels d'entretien de voitures, harnais, etc j'accorde \$150.00.

Enfin \$25.00 pour le coût de l'enlèvement des déchets et du fumier me paraît une somme raisonnable.

La demanderesse doit donc avoir jugement sur sa demande incidente pour la somme de \$2,275.00.

En tout il y a jugement sur les deux demandes pour \$2,527.50 avec dépens.

Quant aux interventions, elles sont renvoyées avec dépens, de même que les défenses. Les réponses de la ville constituent des contestations régulières et devraient avoir le même sort. Elles étaient inutiles. Je les renvoie sans frais. L'intervenante ne paraît pas y avoir attaché beaucoup d'importance, n'y a pas répondu et, comme garante de la défenderesse, elle ne paraît avoir eu d'autre intention que de combattre l'action de la demanderesse.

M. Honan, pour la demanderesse.

Ethier & Archambault, pour la défenderesse.

Archer, Perron & Tuschereau, pour l'intervenante.

COUR DE RÉVISION

MONTREAL, 29 mai 1906.

Présents :—SIR MELBOURNE M. TAIT, Juge en chef, MATHIEU
ET PAGNUELO, JJ.

DUBOIS v. LA VILLE DE ST LOUIS.

Responsabilité—Corporation municipale—Règlement imposant formalité préalable à la construction d'édifices—Erreur des officiers municipaux dans indications fournies en vertu de ce règlement.

Juré:—Lorsque les règlements d'une ville imposent à ceux qui veulent y construire des édifices l'obligation préalable de faire fixer par ses officiers le niveau et l'alignement suivant lesquels les fondations doivent être posées, une erreur dans les chiffres et les indications fournies par ces officiers engage la responsabilité de la ville pour les dommages qui en sont la suite immédiate et directe.

Le jugement inscrit en révision a été confirmé unanimement pour le motif qu'il ne contient pas d'erreur et a été rendu en Cour Supérieure, TELLIER, J., le 30 juin 1905, comme suit :

TELLIER, J. :—

Le demandeur est propriétaire d'un terrain la partie nord du lot No 584 de la subdivision du lot officiel No 11 sur les plan et livre de renvoi officiels du village de la Côte St Louis, faisant front le dit terrain sur la rue St Urbain.

Ayant l'intention d'y faire des constructions, mais ne le pouvant pas sans en obtenir la permission de la ville, il a demandé à cette dernière de lui donner le niveau de la rue, ce qu'elle a fait par ses officiers dûment autorisés, en conformité de ses règlements.

Ceci se passait dans le cours de l'année 1903 et se fiant aux indications et au niveau ainsi donnés le demandeur a commencé à construire une maison avec escalier extérieur descendant jusqu'à la rue afin de permettre l'accès au deuxième étage.

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Ayant terminé le corps principal de sa bâtisse, il a constaté qu'il lui serait impossible de construire cet escalier extérieur, parce que le niveau donné par les officiers de la défenderesse était erroné et inexact, et, par suite de ces données erronées, il avait rehaussé inutilement les fondations de sa propriété d'au moins seize pouces et même de vingt et un pouces. Comme résultat il ne peut pas faire cet escalier sans empiéter sur la rue ou sans faire les changements et les travaux additionnels dont il est parlé plus loin.

Le demandeur allègue qu'il a notifié la défenderesse de tous ces faits, verbalement, à plusieurs reprises, dans le cours des mois de mars et avril 1904 et que les officiers de la défenderesse se sont rendus sur les lieux et ont reconnu leur erreur en déclarant que de fait ils s'étaient trompés en donnant le niveau, et en offrant de payer une certaine indemnité et en lui demandant d'envoyer un état de ses dommages au conseil de la défenderesse, ce qu'il a fait.

Par un protêt notarié signifié à la défenderesse le six mai 1904, le demandeur déclare la tenir responsable des dommages qu'il pourrait souffrir par suite des faits ci-dessus énoncés, tant pour construction extra que pour changement de plan, perte de matériaux et diminution dans la valeur de la propriété.

L'action est en recouvrement de ces dommages que le demandeur porte à \$1,110. suivant un état détaillé dans sa déclaration et dans lequel il fait entrer, outre les frais de construction inutile et la diminution de valeur de l'immeuble, les délais et la perte de temps qu'il subit, ses pas et démarches auprès de la défenderesse et le coût de son protêt.

La défenderesse nie toutes les allégations du demandeur, sauf la signification du protêt du 6 mai 1904.

Par le règlement No 82, concernant la construction des édifices dans la Ville de St Louis, le demandeur qui désirait construire une maison à deux étages sur son terrain, ayant front sur la rue St Urbain, devait, avant d'en commencer l'érection, faire une demande par écrit au secrétaire-trésorier de la ville pour obtenir de l'ingénieur de la ville les niveau et aligne-

ment de la rue St Urbain, en face de la construction à être érigée, et un permis pour faire les travaux qui devaient ensuite être faits en conformité des dispositions de ce règlement. Il a, en conséquence, fait sa réquisition au secrétaire-trésorier qui lui a octroyé le 22 février 1904, un permis de bâtir, et les ingénieurs et officier de la défenderesse se sont rendus sur les lieux et ont, le 25 février 1904, placé deux piquets pour indiquer l'alignement de la rue St Urbain, et sa ligne de division d'avec le terrain du demandeur, et inscrit sur ces piquets les signes et chiffres suivants, savoir : sur le piquet nord $\times 2, 3\frac{1}{4}$ et sur le piquet sud $\times 3$, pour indiquer, d'après eux, que le demandeur devait construire et élever les fondations en pierre de sa maison, à moins de dix pieds de distance de cet alignement et jusqu'à un niveau minimum de deux pieds et trois pouces et quart au-dessus de la tête du piquet nord, et de trois pieds au-dessus de la tête du piquet sud.

Le demandeur avait juste raison de croire que les chiffres et signes inscrits sur ces piquets indiquaient le niveau du trottoir et de la rue St Urbain, en face de sa propriété, et il a, en conséquence, construit les fondations en pierre de sa maison, en prenant pour base ces chiffres et signes, et même en les dépassant, afin de remblayer plus tard son terrain et de lui donner une pente vers la rue. Il a ainsi élevé ces fondations jusqu'à un niveau qui est fixé par ses témoins ingénieurs à treize pouces et quart et par les témoins ingénieurs de la défenderesse à vingt-un pouces et un huitième au-dessus de la tête du piquet nord. Puis, il a terminé le corps principal de sa bâtisse et il lui restait à construire et placer l'escalier extérieur descendant du second étage de sa maison jusqu'à la rue, lorsqu'il s'est aperçu qu'il ne pouvait pas le faire comme il l'avait décidé, sans empiéter sur la rue, ce qui lui a été refusé, et l'a entraîné à faire et placer un escalier temporaire, en bois brut et de mauvaise apparence.

Les ingénieurs et officiers de la ville auraient dû indiquer le niveau de la rue St Urbain en face de la construction à être érigée par le demandeur, à dix pieds de cette rue, et fixer ce niveau comme étant d'un pied et deux pouces, et non pas de deux

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pieds et trois pouces et quart au-dessus de la tête du piquet nord, et ils ont ainsi commis un écart de treize pouces et quart et engagé la responsabilité de la défenderesse, pour les dépenses inutiles et les inconvénients préjudiciables que le demandeur a encourus et devra encourir, par suite et dans les limites de cette erreur de treize pouces et quart.

Le demandeur, en élevant les fondations de sa maison à un niveau de trois pieds et quatre pouces et demi au-dessus de la tête du piquet nord qu'il a pris pour base, leur a donné un surcroît de hauteur de deux pieds et deux pouces et demi, au-dessus du niveau réel de la rue St Urbain, et sur ce surcroît de hauteur, il faut le tenir seul responsable des treize pouces et quart qu'il a jugé à propos d'ajouter pour donner à son terrain la pente voulue vers la rue, et déclarer la défenderesse responsable du surplus de treize pouces et quart qui est le résultat de l'erreur commise par ses officiers.

Par suite de l'erreur dont la défenderesse est responsable, le demandeur, outre les treize pouces et quart de fondations qu'il a érigées erronément et inutilement, s'est trouvé et se trouve dans la nécessité de remblayer et élever son terrain d'autant, de le protéger au front par une bordure en pierre ou en bois, d'adopter un autre plan et une autre forme pour son escalier extérieur qui devra avoir plus de marches, et deux angles au lieu d'un, occuper plus d'espace, et descendre sur son terrain, et non sur la rue, mais il a pu et peut remédier aux dommages et inconvénients qui lui ont été causés par suite de l'erreur imputable à la défenderesse, sans déprécier l'apparence et la valeur de sa propriété, ni obstruer les ouvertures et la lumière de sa maison.

Pour ces raisons, et dans les circonstances établies en preuve, il y a lieu de déclarer que les dommages qui sont dus au demandeur et imputables à la défenderesse ne doivent comprendre que ce qui est une suite immédiate et directe de l'erreur qui a été commise par les officiers de cette dernière, et qu'ils doivent, en conséquence, être évalués et fixés à la somme de \$205.00, et par ces motifs, la défenderesse est condamnée à

payer au demandeur cette somme, avec intérêt du 13 juin 1904, date de l'assignation en cette cause, et les dépens.

Braudin, Loranger & St Germain, pour le demandeur.
Bisaillon, Brossard & Bisaillon, pour la défenderesse.

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COUR SUPÉRIEURE.

CHICOUTIMI, 14 mai 1906.

Présent :—GAGNÉ, J.

PRICE v. LA COMPAGNIE DE PULPE DE CHICOUTIMI & LE PROCUREUR GÉNÉRAL, Intervenant.

Propriété—Cession de terrain par un particulier pour fins de voirie—Preuve—Titre—Action des eaux sur les terrains—Travaux pour la combattre—Effet des lois—Actes publics et actes privés—Effet des déclarations dans les actes privés sur les droits des tiers.

Jugé : —1o. La cession par un particulier à une corporation municipale du terrain nécessaire pour l'élargissement d'une rue peut se faire verbalement et, lorsqu'elle est faite en considération de conditions à remplir, l'accomplissement de ces dernières constitue une preuve suffisante d'acceptation de la cession. Par suite, les tiers ne sont pas reçus à en contester la validité pour cause d'absence de titre ou de déclaration formelle d'acceptation dans les archives de la corporation. La consignation qui s'y trouve d'une résolution pour déléguer à un membre du conseil le soin de s'aboucher et de s'entendre avec le cédant, serait un commencement de preuve suffisant, s'il en était besoin.

2o. Un terrain menacé d'envahissement par les eaux et recouvert de constructions, quais, etc, pour l'en préserver, reste de même que ces travaux la propriété du riverain qui les a faits, ou pour qui ils ont été faits par des tiers.

3o. Les déclarations dans un acte privé de la législature n'affectent pas les droits des tiers qui n'y sont pas spécialement mentionnés.

Un acte n'en est pas moins un acte privé, quoiqu'il ait été déclaré acte public pour en faciliter la preuve. A toutes autres fins, il est public ou privé, selon qu'il est d'une application générale en vue du bien public, ou qu'il ne vise qu'un intérêt particulier et privé.

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Quels sont les titres du demandeur à la propriété des quais et des terrains qu'il revendique par son action ?

Les bords du bassin à Chicoutimi étaient possédés autrefois et ont été en partie défrichés par feu Peter McLeod, l'un des auteurs du demandeur.

Lorsque l'arpentage primitif du canton de Chicoutimi eût lieu en 1845, l'arpenteur Ballantyne, qui était chargé de le faire, divisa une partie de ce canton, qui est appelée "Réserve du canton de Chicoutimi," et qui est mentionnée dans ses rapports comme étant le "*projected town of Chicoutimi*," en lots de ville, "*town lots*," avec rues et places publiques.

L'une de ces rues était la rue No 13 qui se prolongeait le long de la partie est du bassin.

D'après le plan et les notes de l'arpentage primitif, la réserve de cette rue comprenait tout le terrain qui se trouvait entre les lots Nos 25, 48, 49, 72 et 83 et le bassin.

Le 21 octobre 1848, le canton de Chicoutimi fut érigé et soumis au contrôle municipal du conseil No 1, du comté de Saguenay.

En juin 1851, conformément au rapport fait par Ovide Bossé, alors député grand voyer du comté, le conseil de la municipalité passa un règlement ordonnant l'ouverture d'un chemin qui devait partir de la rivière Chicoutimi, près du moulin à farine, et suivre, *autant que possible, le bord du bassin* en faisant le tour jusqu'à la rue qui se trouvait à deux acres de la rivière Saguenay (rue No 2) pour continuer ensuite plus loin.

Ce chemin fut ouvert la même année ou l'année suivante avec une largeur de trente-six pieds.

Le treize mars 1860, le gouvernement accorda des lettres patentes pour les lots ci-dessus mentionnés et d'autres lots à D. E. Price et W. Price en qualité de curateurs à la succession vacante de Peter McLeod, et le 4 octobre 1861, ces lots, avec d'autres, furent vendus en justice à D. E. Price qui en devint le seul propriétaire.

Dans ces lettres patentes, la lisière qui est sur le bord de la partie est du bassin est appelée "*road allowance running along the edge of Chicoutimi Basin, or extension of Thirteenth street.*"

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Plus tard, D. E. Price a vendu plusieurs lots, y compris les lots ci-dessus mentionnés, à Roger Savard, se réservant les droits de riverain sur les bords du bassin.

D. E. Price est décédé en 1883, après avoir légué tous ses biens à son frère John Evan Price qui est aussi décédé en 1899, après avoir institué le demandeur son légataire universel.

A venir jusqu'à ces dernières années, la maison Price, représentée comme susdit, s'est toujours servie du bassin pour le flottage de ses billots, et les poteaux et les ancres dont elle avait besoin pour retenir ses *booms* étaient placés sur l'écore de la partie est du bassin.

Il est établi que l'action de la gelée et des eaux a eu pour effet de miner et de faire ébouler les bords de la partie est du bassin.

Le chemin ouvert en 1851, étant devenu trop étroit, on fut obligé de l'élargir en se servant pour cela du terrain qui avait été réservé pour cette rue, mais il arriva un temps où il fut impossible d'élargir le chemin sans empiéter sur les lots avoisinants, savoir les lots 25, 48, 49, 72 et 83 ci-dessus mentionnés.

Le chemin, considéré comme dangereux, fut fermé par ordre du conseil municipal.

Des démarches furent faites cependant pour le faire ouvrir de nouveau.

Mais le propriétaire des lots en question, Roger Savard, ne voulait pas donner le terrain nécessaire, à moins qu'il ne fût entendu et convenu que la maison Price, qui avait déjà commencé des quais dans une partie du bassin pour sa propre utilité continuerait les quais dans la partie est pour protéger le terrain à l'avenir. Roger Savard exigeait aussi que les trottoirs fussent faits par la maison Price.

La susdite partie du canton de Chicoutimi avait été érigée en village en 1863, et le conseil du village, pour se conformer

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aux demandes qui lui étaient faites, dut s'occuper de la réouverture de cette rue.

Il est admis que la corporation du village était, en vertu de la loi et du code municipal, propriétaire des terrains qui avaient été réservés pour des rues.

Une résolution fut passée le six août 1877, par laquelle le conseiller Thomas Roberge fut autorisé à s'entendre avec Roger Savard pour lui demander (entr'autres choses), à quelles conditions, s'il manquait du terrain pour ouvrir un chemin dans cette partie de rue, il fournirait le terrain nécessaire pour cet objet, et de plus s'il entendait faire un échange de terrain avec la corporation du village de Chicoutimi ou être payé pour le terrain qu'il fournirait, rapport devant être fait au conseil.

Ce rapport s'il a été fait, n'a pas dû être fait par écrit, puis qu'il n'a pas été trouvé dans les archives du conseil.

Mais il est prouvé par l'un des témoins même de la défense, G. Bilodeau, qui était membre du conseil et au témoignage duquel sur les faits en question, aucune objection n'a été faite, que plus tard et pour en finir, tous les membres du conseil se sont rendus sur les lieux et qu'ils y ont rencontré Roger Savard et Michel Caron, représentant de la maison Price.

La discussion fut longue. Finalement Savard consentit à reculer ses maisons et à fournir le terrain nécessaire. Le conseil lui donnait deux petites pointes de terre, Bilodeau admet qu'il a été alors question des quais. C'est un témoin de la défense, et l'on s'aperçoit facilement qu'il n'aime pas à répondre directement aux questions qui lui sont posées. Ses admissions me paraissent cependant suffisantes.

A la page 1 de sa déposition, on voit que la question suivante lui a été posée :

“ C'était entendu entre le conseil et Price qu'il faisait des “quais là ? ”

Il a répondu : “ Nous étions toujours consentant puisqu'on “marchait avec.”

A la page 19, on lui a demandé : —“Quelles raisons M. “Savard donnait-il pour prétendre que M. Price devait construi-

"re des quais là ?" Et il a répondu : "S'il construisait les quais, il donnait le terrain."

"Tout a été fait verbalement," dit-il à la page 18, "et à l'amiable."

La preuve faite par la résolution du conseil que je viens de mentionner, par les témoins Martin, Sturton, William Tremblay et George Bilodeau me paraît établir clairement qu'il y a eu une entente entre Roger Savard, le conseil et la maison Price, au sujet des quais.

Ce qui a eu lieu ensuite le démontre encore davantage. Il y a eu, en effet, exécution complète de l'arrangement par les parties. D'un côté Roger Savard a reculé ses maisons et fourni le terrain nécessaire à l'élargissement de la rue ; de l'autre côté, la maison Price a fait les trottoirs (témoignage de Dame Martin) et elle a commencé de suite la construction des quais dans cette partie du bassin et elle les a continués jusqu'à ce qu'ils aient été terminés, vers 1890.

Le conseil ne s'est jamais opposé à la construction de ces quais, au contraire, comme le dit George Bilodeau, il en était très content.

Ces quais étaient évidemment faits dans l'intérêt des trois parties à l'arrangement, la rue se trouvait protégée contre l'envahissement des eaux, et ni le conseil, ni Roger Savard n'étaient exposés à l'avenir à donner du terrain pour élargir la rue. De son côté la maison Price profitait de ces quais pour y mettre son bois, etc. . . .

Ces quais devaient, naturellement, être faits le long de l'écore et reposer sur le terrain dont la surface avait été enlevée par l'action des eaux.

De ce qui précède, on doit nécessairement conclure, suivant moi, que le conseil, en considération du terrain qui lui était fourni par Roger Savard pour l'élargissement de la rue, et aussi en considération de la construction des quais qui devaient protéger le terrain de la rue à l'avenir, a abandonné à la maison Price tout le terrain sur lequel les quais ont été construits.

Il ne s'agit pas d'une donation pour laquelle on pourrait

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peut-être exiger un acte notarié, mais en réalité d'un échange ou d'une cession pour considération.

Le savant avocat de la défense admettait, à l'audition au mérite, qu'un acte n'est pas toujours nécessaire pour établir un abandon de terrain par un conseil et qu'il peut y avoir abandon *de facto*.

En supposant qu'une preuve par écrit serait nécessaire, je suis d'avis qu'elle existe au dossier, car la résolution du 6 août 1877 offre, suivant moi, un commencement de preuve suffisant.

Cette résolution, en effet, chargeait l'un des conseillers de s'entendre avec Roger Savard, de lui demander à quelles conditions il fournirait le terrain nécessaire pour élargir la rue, s'il consentait à un échange, etc.

Est-ce que cette résolution ne rend pas vraisemblable le fait allégué, savoir : l'entente qui a eu lieu plus tard, l'échange qui a été fait ? Evidemment.

De plus, aucune objection n'a été faite aux réponses de G. Bilodeau, témoin de la défense, qui a prouvé clairement la susdite entente.

La preuve qui a été faite est donc légale, en supposant même qu'une preuve par écrit serait nécessaire.

Mais je suis d'avis que le demandeur n'est pas tenu de faire une preuve par écrit.

Il est certain qu'il n'est pas nécessaire de produire des actes pour établir qu'un terrain a été dédié ou abandonné au public pour en faire un chemin ou une rue.

Nos tribunaux l'ont décidé bien des fois.

Guy & La Cité de Montréal. (1)

Myrand & Légaré. (2)

La Cité de Montréal & Léveillé. (3)

Town of Westmount & Warminton. (4)

Lachevrotière & La Cité de Montréal. (5)

(1) 1 D. C. A. 51.

(2) 6 Q. L. R. 120.

(3) 4 B. R. 210.

(4) 9 B. R. 101.

(5) Beauchamp, Cons. Pr., 399.

Il en est de même de l'acceptation de cette dédication et des conditions de cette dédication par les autorités municipales.

Une acceptation formelle et par écrit n'est pas nécessaire ; les autorités ci-dessus l'établissent clairement.

Dillon, on Municipal Corporations, Vol. 2, No 632, dit :

" A proposal by a land owner to give free of charges, and
 " upon certain *conditions* to be performed by the city so much
 " of his land as may be required to open or widen a street or
 " highway, will, if the proposal be accepted and conditions com-
 " plied with, in a reasonable time, estop such owner from claim-
 " ing damages for his land ; a formal vote of acceptance is not
 " necessary, and a seasonable fulfilling of the conditions of the
 " offer is sufficient."

J'ai dit à quelle condition Roger Savard offrait de fournir le terrain nécessaire pour élargir la rue. C'était à condition que la maison Price ferait des quais pour protéger le terrain, ce qui ne pouvait se faire que si le conseil y consentait et abandonnait à la maison Price le terrain nécessaire à cette fin.

En prenant possession du terrain offert pour la rue, le conseil acceptait évidemment l'offre faite par Roger Savard et la condition imposée par lui et il s'obligeait de faire construire les quais par la maison Price.

Or, cette condition a été remplie, puisque les quais ont été construits par la maison Price.

Les faits seuls établissent donc clairement que le conseil a accepté la dédication faite par Roger Savard avec la condition imposée par lui et qu'il a formellement consenti à cette condition et à la construction des quais par la maison Price.

Une preuve écrite n'était donc pas nécessaire.

Il est certain que Roger Savard n'aurait pas fourni le terrain nécessaire à l'élargissement de la rue, si le conseil n'avait pas consenti à donner à la maison Price le droit de construire les quais qui devaient protéger le terrain à l'avenir.

C'est une compensation que Savard avait droit d'exiger et qu'il était dans son intérêt d'exiger.

Maintenant que les quais ont été construits, comme il le demandait, et que ces quais ont coûté plusieurs milliers de

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piastres, Roger Savard pourrait-il réclamer le terrain qu'il a fourni, par l'élargissement de la rue ? Evidemment non.

De même, maintenant que le terrain nécessaire à l'élargissement de la rue a été fourni par Savard et livré à la circulation du public, le conseil pourrait-il expulser la maison Price des susdits terrains ? Je ne le crois pas.

Il y a eu, suivant moi, abandon réciproque, abandon par Roger Savard du terrain donné pour élargir la rue, et abandon par le conseil du terrain sur lequel les quais sont construits.

Je suis donc d'avis que si le conseil était réellement propriétaire du terrain sur lequel les quais ont été construits, la maison Price est devenue propriétaire, non seulement des quais qu'elle a construits à ses frais, mais aussi du terrain sur lequel ils reposent.

La maison Price a toujours, depuis le commencement des travaux de construction de quais, vers 1880, possédé les dits terrains, et elle en a toujours joui sans aucun trouble et à titre de propriétaire jusqu'à la prise de possession par la défenderesse.

Et ce n'est pas le conseil de ville qui conteste ses droits, c'est un tiers, et je ne vois pas qu'il puisse réussir dans ses prétentions s'il n'a pas un titre préférable.

Dans tous les cas, je crois que personne ne pourrait prétendre que la maison Price n'a pas, au moins, acquis un droit de superficie sur les dits terrains.

Ces quais, en effet, ont été construits par la maison Price à ses frais et avec le consentement tacite et même formel des autorités municipales, en vertu d'une entente intervenue entre Roger Savard, le conseil et la maison Price.

C'est même pour remplir une obligation contractée par le conseil que ces quais ont été construits par la maison Price, puisque le conseil n'avait obtenu de Roger Savard le terrain requis pour élargir la susdite rue qu'à la condition de faire construire des quais par la maison Price.

Or, nous dit Baudry-Lacantinerie, *Traité des Biens*, p. 37 :
" Le tiers constructeur ne pourrait prétendre à un droit réel

“ sur les édifices, par suite à un droit immobilier, que si, à un moment quelconque, un accord de volonté était intervenu entre le propriétaire et lui, une convention pouvant s’inter-prêter soit comme une translation de la propriété du terrain bâti, soit au moins comme la création d’un droit de superficie au profit du constructeur ; il en serait ainsi, par exemple, dans le cas où le propriétaire du fonds aurait connu les travaux ou les aurait *laissé s’achever* sans protestation, et à fortiori, dans le cas où il aurait donné une autorisation formelle.”

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En note : “ L’autorisation expresse ou tacite donnée par le propriétaire du sol au constructeur ne peut s’interpréter ainsi, en général, que comme une concession d’un droit de superficie. En accordant la permission de bâtir sur son terrain, le propriétaire autorise le constructeur à maintenir les édifices tant qu’ils dureront et renonce à tout droit d’accession à leur égard.”

Nul doute que ce droit de superficie donnerait à la maison Price le droit de revendiquer et les quais et le terrain contre un *usurpateur*.

Mais je suis convaincu qu’il y a plus qu’un droit de superficie de concédé, il y a eu un échange complet et sans réserve. Le terrain donné par Savard était donné à perpétuité, et les quais étaient évidemment érigés à perpétuelle demeure pour la protection du terrain. Il y avait donc des deux côtés, de la part de Roger Savard et de la part du conseil, abandon complet et final, et la maison Price devait jouir du terrain à perpétuité.

Si l’on prétendait que ce terrain revenait de droit en vertu de la loi et de l’entente ci-dessus à Roger Savard, qui fournissait le terrain nécessaire pour la rue, il faudrait en venir à la même conclusion, car il n’y a pas de doute que Roger Savard, en exigeant la construction des quais par la maison Price comme condition de l’abandon qu’il faisait du terrain nécessaire pour la rue, abandonnait lui-même les droits qu’il pouvait avoir sur le terrain des quais.

D’ailleurs, il est en preuve que la succession Savard a cédé

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et transporté à la maison Price tous les droits qu'elle pouvait avoir sur ces terrains.

Je suis donc d'avis que le demandeur est devenu propriétaire, non seulement des quais, mais encore du terrain sur lequel ils sont construits, si le conseil ou Roger Savard en était réellement propriétaire.

Mais le conseil est-il réellement propriétaire du terrain sur lequel les quais ont été construits, et pouvait-il en transporter la propriété ?

Question importante et qui n'est pas sans difficulté.

La défenderesse et l'intervenant soutiennent que le terrain sur lequel les quais reposent sont des lots de grève, qui appartiennent à la Couronne, et que la Couronne les ayant concédés par lettres patentes à la défenderesse, cette dernière en est maintenant seule propriétaire.

Il faut d'abord bien établir sur quel terrain ont été construits ces quais. Est-ce sur des lots de grève ? Est-ce sur un terrain qui était propriété privée ?

La largeur de la rue No 13 "*road allowance, extension of the Thirteenth*" n'est pas mentionnée dans les notes de l'arpentage primitif.

C'est toute la lisière de terrain qui se trouvait entre les lots 72, 49, 48 et 25 et le bassin que l'arpenteur a laissé "*road allowance*." Il prévoyait sans doute que ce terrain serait miné par l'eau et il a voulu laisser plus de terrain pour cette rue que pour les autres, dont la largeur ordinaire est de 66 pieds.

L'arpenteur Gauvin, qui n'a point vu les lieux avant 1899, donne lui-même une largeur de 81 ou 91 pieds à cette rue, à l'endroit indiqué par lui sur le plan par les lettres A, B.

Il est certain que cette rue, telle qu'elle a été réservée, devait être très large.

Le premier chemin a été tracé sur le bord de l'écore en 1851 ou 1852 par monsieur le shérif Bossé.

Les témoins qui ont vu les lieux, de 1851 à 1860, s'accordent à dire que le bassin était alors beaucoup plus étroit, qu'il n'a pu s'élargir du côté ouest où il n'y avait que du roc, mais qu'il s'est élargi considérablement du côté est, où se trouvait

la rue No 13. D'après ces témoins qui, à vrai dire, ne sont pas contredits, le bassin s'est élargi d'environ un tiers de sa largeur actuelle et les quais sont sur le terrain qui était la terre ferme lorsqu'ils sont venus à Chicoutimi, après l'ouverture du premier chemin.

M. Bossé déclare que les écores du bassin étaient droits, à pic, que le bassin est maintenant bien plus étroit et qu'il s'est élargi *dans une grande proportion*.

David Blair, qui venait souvent à Chicoutimi en 1852 et depuis, déclare que le bassin est au moins un tiers plus large qu'alors, et que les quais couvrent ce qui était alors terre ferme.

D. Blair dit en substance la même chose ainsi que Grant, Forrest, Jean Riverain, Petit, Lespérance, etc.

Henri Fortin, témoin de la défense, admet que les quais sont sur le terrain éboulé.

Joseph Fortin, témoin de la défense, admet que la grève a été formée par les éboulements du terrain.

George Bilodeau, autre témoin de la défense, admet que la grève dont il parle dans son témoignage était formée par l'éboulement, que le terrain était mangé par l'eau et que le bassin était alors plus étroit qu'à présent.

Et William Tremblay, arpenteur, le principal témoin de la défenderesse, admet à la page 25 de sa déposition, *qu'il y avait une rue à peu près où sont les quais*.

En fait, les témoins de la défense corroborent ce qui a été affirmé par les témoins de la demande.

D'après M. Gauvin, l'arpenteur du gouvernement, les quais auraient une largeur de 100 à 105 pieds, p. 53. Cette largeur ne serait pas uniforme, et elle serait certainement moindre à certains endroits.

Elle serait en général beaucoup moindre d'après le plan ex. D2 à l'enquête, qui donne la largeur sur toute la longueur des quais.

Cette largeur serait de 49, 63, 76, 80, 90, 83, 90, 108 et 105 pieds.

Quoi qu'il en soit, ces quais ne s'étendaient pas jusqu'à l'ali-

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gnement est de la rue No 13 ou Montcalm. Et comme les témoins qui ont vu les lieux après l'arpentage primitif et l'ouverture du premier chemin assurent que ces quais ont été construits à l'endroit où se trouvait alors la terre ferme, il s'en suit nécessairement que les quais ont été construits dans le terrain réservé pour la rue No 13.

Ce fait est constaté dans un statut, le statut 4 Ed. VII, ch. 62, invoqué par la défense, dans lequel il est déclaré que ces quais ont été construits partie dans la rue Montcalm et partie sur le terrain qui était réservé pour cette rue et est implicitement admis dans le plaidoyer de la défenderesse.

La corporation du village et subséquemment la ville de Chicoutimi étaient donc, en vertu de la loi, propriétaires de ces terrains.

Ont-elles perdu leurs droits sur la partie de ces terrains qui a été minée par l'eau et s'est éboulée ?

C'était évidemment à la défenderesse et à l'intervenant à le prouver. Ces quais ont été construits pour combattre l'envahissement des eaux, pour protéger le terrain et reconquérir une partie du terrain éboulé.

Le lot de grève concédé par la Couronne à la défenderesse est précisément sous ces quais.

Quand cette concession a été faite, il y avait près de vingt ans que les quais étaient commencés et plus de dix ans qu'ils étaient terminés, que le terrain avait été reconquis et que les quais étaient en la possession paisible et publique de la maison Price.

Le propriétaire riverain a-t-il le droit de construire ou faire construire par des tiers des quais pour protéger son terrain contre l'envahissement des eaux et même reconquérir le terrain perdu.

L'affirmative a été jugée par le juge Cimon et par la Cour de Révision dans une cause de la *Compagnie de Pulpe de Chicoutimi vs Dame Flavie Racine* ⁽¹⁾ dans laquelle il s'a-

(1) 30 C. S.

gissait précisément d'un quai qui était la continuation des quais en question en cette cause. Les faits étaient les mêmes et la question était aussi la même.

Il me suffira donc de référer aux notes du juge Cimon et à celles du juge Langelier qui a rendu jugement au nom de la Cour de Révision et à celle du juge en chef Casault.

Comme l'hon. juge Cimon et comme la Cour de Révision, je suis d'avis que, ni la corporation du village, ni la corporation de la ville n'avaient perdu leurs droits sur les terrains en question, qu'ils ont pu en transférer la propriété légalement, et que les lettres patentes accordées par le gouvernement pour ces terrains n'ont aucune valeur, parce que les terrains n'étaient pas des lots de grève ou n'appartenaient pas à la Couronne.

La défenderesse et l'intervenant ont, de plus, plaidé qu'après bien des pourparlers, il est intervenu, en septembre 1899, entre le demandeur, la défenderesse et le gouvernement, une entente ou un arrangement par lequel le demandeur renonçait à toute cette partie du bassin qui est réclamée par l'action et consentait à la vente de cette partie par le gouvernement à la défenderesse, à condition que le gouvernement lui cède (au demandeur) l'autre partie du bassin, et que c'est en vertu de cet arrangement que des lettres patentes ont été émises en octobre 1900 en faveur de la défenderesse, pour tout le terrain ou la grève couverte par les quais en question en cette cause.

Cet arrangement entre les parties a-t-il été prouvé ?

La défenderesse avait constaté que la maison Price qui avait construit des quais sur les bords du bassin depuis un grand nombre d'années et qui en avait toujours joui à titre de propriétaire, n'avait pas de titre de la Couronne, et elle s'était adressée au gouvernement pour se faire concéder en propriété et par lettres patentes toutes les grèves du bassin, savoir tous les terrains occupés par les quais de la maison Price.

La maison Price s'opposa à cette demande, mais comme le gouvernement se prétendait propriétaire de ces terrains qu'il considérait comme grèves, elle crut prudent de demander elle-même un titre pour ses terrains, tout en déclarant qu'elle se croyait propriétaire.

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Dans l'été 1898, M. Marchand, premier ministre, M. Parent, commissaire des terres de la Couronne, MM. Garneau, Dubuc, Blair, Ray et autres se rendirent sur les lieux, au bassin, pour voir s'il n'y aurait pas moyen d'en venir à une entente entre les parties.

Il est admis qu'aucun arrangement ne fut alors conclu. Après l'entrevue il y eut un dîner au château Saguenay, auquel M. Ray, employé de la maison Price, assista et durant lequel il proposa des santés au champagne.

En septembre 1899, M. Parent, alors premier ministre, accompagné de M. Gauvin, arpenteur du gouvernement et MM. Garneau et Dubuc, représentant la défenderesse, se rendirent de nouveau sur les lieux pour y rencontrer les représentants de la maison Price et en venir à une entente, si elle était possible.

MM. Parent, Garneau et Dubuc jurent que la maison Price était alors représentée par monsieur *David Blair*, gérant de la maison à Chicoutimi, et par M. Ray, commis au bureau de Québec. Ils déclarent qu'après une assez longue discussion avec MM. *Blair* et *Ray*, il fut entendu que la maison Price renonçait à la partie est du bassin, qu'elle donnait de plus à la défenderesse un droit de passage sur ses terrains pour un trolley aérien, et que le gouvernement accorderait des lettres patentes à la compagnie de pulpe pour la partie est du bassin et à la maison Price pour l'autre partie.

M. Gauvin, après avoir dit qu'il avait compris qu'il y avait eu un arrangement, a fini par admettre qu'il ne se rappelait *pas du tout* ce qui avait été dit dans cette entrevue, et qu'il n'était pas, par conséquent, en état de dire quel arrangement avait été fait.

MM. Garneau et Dubuc ont affirmé qu'il n'avait pas alors été question de certains lots sur la rivière Chicoutimi que la maison Price voulait obtenir, ou, s'il en avait été parlé, que rien n'avait été dit qui valût la peine d'être mentionné.

M. Parent, lui, a admis qu'il en avait été parlé.

La question, a-t-il dit, n'a pas été réglée ce jour-là, mais il

s'est obligé à la régler et à rendre justice, et *M. Blair* a consenti à s'en rapporter à lui.

D'après *M. Parent*, donc, contrairement à ce qui a été dit par *MM. Garneau* et *Dubuc*, la question des lots aurait été discutée, et il aurait promis de rendre justice, ce qui aurait satisfait *M. Blair*.

MM. Garneau et *Dubuc* ont déclaré que dans l'arrangement pour le droit de passage, il aurait été question d'un trolley aérien et d'un tramway. D'après *M. Parent* il n'a été question que d'un trolley aérien. Dans une lettre datée du trois septembre 1900, pièce D13, *M. Dubuc* ne parlait que d'un trolley aérien.

Ces trois témoins disent qu'après l'entrevue, ils sont allés au château, où *M. Ray* les aurait *traités* au champagne. *M. Ray* le nie. C'est l'année précédente que cela a eu lieu, non en 1899.

M. Price, le chef de la maison, venait de mourir, et il est peu probable que *M. Ray*, l'employé de la maison, eût consenti à assister à un dîner, à faire un discours et à offrir des santés au champagne, et cela, le jour même des funérailles.

M. Ray n'admet pas l'arrangement tel qu'allégué par *MM. Parent*, *Garneau* et *Dubuc*. D'après lui, il n'y a pas eu d'arrangement final, et il n'avait aucune autorité pour en faire.

Il y a eu des propositions d'arrangement. La compagnie de pulpe demandait un droit de passage pour un trolley aérien et la partie est du bassin.

De son côté, *M. Ray* exigeait les lots sur la rivière Chicoutimi et une confirmation pure et simple du titre de la maison *Price* sur la partie ouest du bassin, la maison *Price* ne voulant rien payer pour cette partie du bassin qu'elle disait lui appartenir.

D'après *M. Ray*, c'étaient les conditions de l'arrangement proposé, il était disposé à le recommander à la maison *Price*.

Quant à *M. Blair*, il jure positivement qu'il n'a pas assisté à cette entrevue.

Il est clairement établi que cette entrevue a eu lieu le deux septembre.

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M. Dubuc ne se rappelle pas la date de l'entrevue. M. Garneau sait que c'était dans les premiers jours de septembre. M. Parent admet que c'est possible que ce soit le deux. Mais M. Gauvin, lui, est en état de déterminer cette date. Il est arpenteur et il a tenu des notes de ses opérations. Il est allé à la chute Caron, le quatre, un lundi, après cette entrevue, et comme elle n'a pas eu lieu le dimanche, elle a dû nécessairement avoir lieu le deux, le samedi, et son rapport, produit dans le dossier, le constate d'une manière certaine.

M. Ray l'établit aussi positivement, et il jure positivement que M. Blair n'était pas à cette entrevue.

Le deux septembre, M. Blair était à Québec pour les funérailles de M. Evan John Price, chef de la maison. Cela est constaté par M. Blair lui-même, par M. Ray, M. Owen et M. Price.

Je vois de plus, dans le dossier, une lettre de la compagnie de pulpe, datée du 16 janvier 1902, signée par le gérant, M. Dubuc, dans laquelle il allègue formellement que l'arrangement dont la défenderesse veut se prévaloir avait été conclu à l'entrevue à laquelle M. Marchand avait assisté, c'est-à-dire à l'entrevue de 1898.

Les témoins de la défense ont évidemment confondu les deux entrevues, celle de 1898 avec celle de 1899.

Pour des hommes d'affaires qui ont beaucoup d'occupations la chose peut s'expliquer assez facilement, surtout lorsqu'il s'agit de faits qui datent de quelques années.

Quoi qu'il en soit, en supposant même qu'il n'y aurait pas d'autres témoins que ceux de la défense, cette confusion des deux entrevues serait certainement de nature à me laisser dans une certaine incertitude au sujet de qui s'est réellement passé à l'entrevue du deux septembre 1899.

Et il y a le témoignage positif, formel de M. Ray, témoin du demandeur, qui rapporte les faits d'une autre manière.

Tenant compte des grosses erreurs et des contradictions que je viens de mentionner, je ne puis en venir à la conclusion que la défense a fait une preuve suffisante de l'arrangement qu'elle allègue et des conditions de cet arrangement.

Dans tous les cas, il est certain que M. Ray n'était pas autorisé à conclure un arrangement. Quand l'entrevue a eu lieu, le chef de la maison, M. John Evan Price, venait de mourir et l'on ne savait même pas encore quel était son successeur. M. Ray n'avait été envoyé à Chicoutimi que pour voir ce qui serait proposé et faire rapport.

Je suis donc convaincu qu'aucun arrangement final n'a été fait le deux septembre 1899.

Mais on soutient que le demandeur a subséquemment, volontairement accepté et exécuté entièrement l'arrangement allégué par la défense.

Entendu comme témoin, le demandeur a nié avoir jamais accepté cet arrangement.

Pour établir que le demandeur avait subséquemment accepté et exécuté le dit arrangement, et que cet arrangement était devenu final, il fallait nécessairement prouver que le demandeur avait été mis au fait de cet arrangement, qu'il l'avait accepté et qu'il s'y était conformé de même que la défenderesse et le gouvernement.

Or, quel est l'arrangement qui a été proposé au demandeur ou qui a été porté à sa connaissance après la susdite entrevue ?

C'est celui qui lui a été soumis par M. Ray, qui avait été envoyé pour prendre connaissance des propositions d'arrangement et en faire rapport au demandeur.

D'après ce rapport, l'arrangement proposé était le suivant et je ne suis pas prêt à dire, vu les contradictions de la preuve que ce n'est pas la véritable version des propositions d'arrangement.

Le demandeur devait renoncer à la partie est du bassin et donner le droit de passage pour un trolley aérien, mais la compagnie de pulpe devait abandonner les lots de la rivière Chicoutimi, et le gouvernement devait confirmer purement et simplement le titre du demandeur à la partie ouest du bassin.

Comme on le voit, ce projet d'arrangement n'est pas le même que celui allégué par la défenderesse.

Cet arrangement, d'après le demandeur, n'a jamais été conclu. Il eût été, cependant, disposé à l'accepter si la défende-

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resse et le gouvernement l'eussent accepté et en eussent rempli les conditions.

Il a permis, il est vrai, à la défenderesse de passer sur ses terrains, mais sans lui donner de titre. C'était en attendant un règlement. Les lettres D12 et D13 font voir que la maison Price ne consentait pas à donner ce droit de passage.

Maintenant a-t-il livré lui-même à la défenderesse la possession des quais de la partie est du bassin ?

Monsieur Dubuc a déclaré que la compagnie de pulpe avait *pris possession* de ses quais presque immédiatement après l'arrangement, mais il a ajouté que c'était sans opposition et même avec le consentement de M. Blair qui, *s'il se rappelle bien*, était présent sur les lieux lorsque l'arpenteur Gauvin a fixé la ligne de séparation, et qui était allé avec lui, M. Dubuc, pour montrer où devait être cette ligne. M. Blair avait aussi, d'après M. Dubuc, consenti à enlever la dalle qui se trouvait sur les quais et dont s'était servie la maison Price jusque-là, et cela afin de lui livrer la possession des quais.

M. Blair nie avoir jamais donné de consentement à cette prise de possession.

Il jure qu'il n'était pas présent lorsque l'arpenteur a établi une ligne de séparation entre la partie est et la partie ouest du bassin, et son témoignage est *corroboré* par celui de l'arpenteur même.

Il admet qu'il a enlevé les dalles, mais c'était parce qu'elles étaient endommagées et détériorées et il l'a fait pour conserver le bois. La compagnie de pulpe ayant enlevé des madriers de ces dalles, il en a fait payer la valeur par la compagnie.

Il n'a rien fait pour livrer la possession des quais, c'est le gouvernement qui en a donné la possession à la défenderesse.

En fait, ce qui est arrivé, c'est qu'immédiatement après l'entrevue du deux septembre 1899, le gouvernement, qui se disait propriétaire de ces terrains, a fait faire un mesurage et un plan de la partie est du bassin par son arpenteur et l'a livré à la défenderesse qui en a pris possession de suite.

Le demandeur a aussi déclaré qu'il n'avait rien fait pour li-

vrer possession des quais à la défenderesse. Si la défenderesse en a obtenu la possession, ce n'est pas par le fait du demandeur, mais par le fait du gouvernement qui se prétendait propriétaire du terrain qu'il considérait comme une grève et qui en a donné la possession à la défenderesse après avoir fait faire un arpentage et un plan du terrain et des quais. Ne voulant pas entrer en lutte contre le gouvernement, le demandeur a laissé faire, attendant une autre occasion de faire valoir ses droits, s'il y avait lieu.

Le demandeur a aussi soutenu que cet arrangement qui lui a été proposé par M. Ray, il eut été disposé à l'accepter si les conditions en eussent été remplies par la défenderesse et par le gouvernement.

Or, il est établi que la défenderesse, après la dite entrevue, a formellement refusé de céder les lots de la rivière Chicoutimi. De fait, elle prétendait qu'il *n'en avait pas même été question* dans l'entrevue.

Ce n'est que longtemps après, près de deux ans après, et lorsque le demandeur avait mis de côté complètement le susdit arrangement, qu'il est intervenu un arrangement spécial au sujet de ces lots.

Le demandeur a consenti à donner un titre à la défenderesse pour le susdit droit de passage à condition que la défenderesse lui cède les lots et cette dernière y a consenti.

Quant à la partie ouest du bassin, il est certain que le gouvernement n'a point consenti à donner au demandeur une confirmation pure et simple de son titre ou de sa possession.

Il a exigé une somme considérable, treize mille ou quinze mille piastres, et le demandeur, pour conserver la possession de cette partie du bassin qui lui était nécessaire, s'est cru obligé de payer cette somme, mais il l'a fait sous protêt, et en réservant ses droits.

Si les propositions d'arrangement étaient bien celles qui ont été rapportées par M. Ray, (et ce sont celles-là qui ont été soumises au demandeur), on admettra facilement que le demandeur était justifiable de les mettre de côté et de les considérer comme non avenues.

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Quant à l'arrangement tel qu'il est allégué par la défenderesse, il est évident que le demandeur ne peut être considéré comme l'ayant accepté, et comme en ayant accepté les conditions, puisqu'il les ignorait.

Les eut-il connues, je crois qu'il serait difficile de dire qu'il les a volontairement acceptées et remplies.

J'ai déjà expliqué qu'il n'a réellement consenti à donner un droit de passage, c'est-à-dire à donner un titre que lorsque la défenderesse a consenti à lui céder les lots de la rivière Chicoutimi, près de deux ans après l'entrevue du deux septembre.

Ce n'était donc point pour se conformer au susdit arrangement.

Quant à la partie est du bassin, j'ai déjà aussi expliqué que c'est le gouvernement qui s'en prétendait propriétaire et qui en a donné la possession à la défenderesse. Tout ce que l'on peut dire, c'est que le demandeur n'a pas empêché la chose qu'il l'a laissé faire. Cela ne me paraîtrait pas suffisant dans les circonstances pour constituer une acceptation de l'arrangement.

Je suis donc d'avis que l'arrangement allégué par la défenderesse et l'intervenant n'a pas été prouvé.

La défenderesse et l'intervenant ont en outre plaidé que la législature provinciale avait reconnu que les susdits terrains étaient la propriété de la défenderesse par le statut 4 Ed. VII, chapitres 62 et 85.

Le chapitre 62 est un statut qui amende la charte de la ville de Chicoutimi.

La clause 18 de ce statut déclare que la ville est et demeure propriétaire de toutes les rues ouvertes et de tous les terrains réservés lors de l'arpentage et sur les plans primitifs de la division du village de Chicoutimi pour des rues, etc., sauf les droits acquis, et elle ajoute :

" Néanmoins le droit de propriété de la ville ne s'étend pas
" à toute partie de la rue Montcalm sur laquelle sont mainte-
" nant bâtis les quais de la compagnie de pulpe de Chicouti-
" mi, ni aux terrains longeant cette rue à l'ouest, lesquels ter-
" rains avaient été réservés sur les plans primitifs de la divi-

“ sion du village de Chicoutimi pour une rue, et sur lesquels
 “ sont également construits les dits quais : ni aux terrains
 “ (description d'autres terrains réservés et d'autres lots) ; et
 “ tous les terrains sont déclarés avoir été et être la propriété de
 “ la compagnie de pulpe de Chicoutimi. ”

Le chap. 85 des statuts 4 Ed. VII est un statut intitulé :
 “ Loi concernant la Compagnie de Pulpe de Chicoutimi. ”

La clause 2 de ce statut déclare que l'émission d'obligations faite par la dite compagnie de pulpe est mentionnée dans un acte de fidéicommis et d'hypothèque passé à Montréal le 11 août 1902, devant notaire, entre cette compagnie et la Royal Trust Co., les dites obligations et le dit acte de fidéicommis et d'hypothèque sont valides, et que le dit acte devra être interprété comme s'étendant à, et affectant des droits qui y sont mentionnés, tous les biens et particulièrement les immeubles y sont décrits, lesquels immeubles mentionnés avec d'autres dans les titres énumérés dans la cédule C de cette loi, sont déclarés avoir été et être sujets aux dispositions du dit acte de fidéicommis, en la possession et la propriété de la compagnie de pulpe de Chicoutimi.

La cédule C contient une liste de divers titres ou actes sans indications des propriétés qui y sont mentionnées.

Le demandeur a répondu que ces statuts sont des statuts privés qui n'affectent pas ses droits, vu qu'il n'y est pas mentionné.

L'article 9 du code civil déclare que nul acte de la législature n'affecte les droits de la Couronne, à moins qu'ils n'y soient compris par une disposition expresse, et il ajoute : “ Sont également exempts de l'effet de tel acte les droits des tiers “ qui n'y sont pas spécialement mentionnés, à moins que l'acte “ ne soit public et général.”

Le conjonction “qui” est traduite par le mot “who” dans la version anglaise, ce qui fait voir qu'elle se rapporte non aux droits, mais aux tiers qui doivent être spécialement mentionnés dans ses statuts.

La section 14 des statuts refondus, qui est donné comme l'une des dispositions déclaratoires et interprétatives des sta-

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tuts, est ainsi rédigée : " de même, nul statut d'une nature
" locale et privée n'affecte les droits des tiers, à moins qu'ils
" n'y soient spécialement mentionnés."

Le statut chap. 62, 4 Ed. VII est-il un statut privé et local
ou un statut public et général ?

" Parliament," dit Hardcastle, p. 476 : "now understands
" by private bills all those projects of law which affect the
" interests of particular localities, and are not of a public
" general character and are introduced by petition."

Bourinot, parliamentary procedure, p. 585, nous donne la
définition d'un statut privé et celle d'un statut public.

" Private bills, dit-il, are distinguished from public bills,
" inasmuch as they directly relate to the affairs of private
" individuals or corporate bodies, and not to matters of pub-
" lic policy or to the community in general."

p. 608. " Bills from the *corporations of towns* and muni-
" cipal bodies generally are always treated as private bills
" when they desire special legislation affecting their proper-
" ty or interest."

Tous ces bills qui concernent les corporations de ville ou les
corporations privées sont toujours présentés à la législature
comme bills privés, et ne deviennent loi qu'après l'accomplis-
sement des formalités requises pour les bills privés.

Le statut chap. 62, 4 Ed. VII est donc de sa nature un bill
privé.

Mais on cite l'art. 10 du code civil, (art. 35 St. Ref.) qui
déclare que tout acte est public, à moins qu'il n'ait été déclá-
ré privé. Ce statut n'ayant pas été déclaré privé, on allègue
qu'il est public et qu'il affecte par conséquent les droits des
tiers.

C'est une erreur.

" Quant aux particuliers, dit le juge Langelier, dans son
" Cours de Code Civil, art. 9 et 10, il faut distinguer entre les
" statuts publics et les statuts privés. Ils sont affectés par les
" statuts publics, mais ne le sont pas par les statuts privés, s'ils
" n'y sont pas expressément mentionnés."

" Un statut public est celui qui affecte la généralité des

" citoyens ou toute une classe de citoyens, par exemple, les
 " marchands, les avocats, etc. Le statut privé est celui qui af-
 " fecte un certain individu déterminé ou un certain nombre
 " d'individus."

" La règle est que tout statut est réputé public à moins qu'il
 " n'ait été déclaré privé. Faut-il en conclure que tous les sta-
 " tuts privés, aujourd'hui, affectent les tiers, même lorsqu'ils
 " n'y sont pas mentionnés ? Il y aurait alors contradiction en-
 " tre notre article et la disposition des actes d'interprétation
 " des statuts."

" Mais tel n'est pas le sens de cette règle d'interprétation."

" Ce qu'elle veut dire, en substance, c'est qu'il n'y a plus be-
 " soin, pour invoquer un statut privé, d'alléguer et prouver
 " qu'il a été passé."

Sans cette règle, en effet, on serait obligé de le faire, car
 l'art. 10 du c. civil, et la sec. 35 des St. Ref., déclarent que
 chacun est tenu de prendre connaissance des actes publics,
 mais que les actes ou statuts privés devront être plaidés.

On a compris que c'était un inconvénient sérieux dans la
 pratique, et pour le faire disparaître, on a déclaré que tous
 les statuts étaient publics, afin que chacun fût tenu d'en pren-
 dre connaissance.

Cette opinion du juge Langelier est conforme à celle des au-
 teurs en Angleterre.

En Angleterre comme ici, les statuts privés doivent être
 plaidés.

Autrefois on insérait souvent dans les statuts privés, une
 clause déclarant qu'ils seraient considérés comme publics.

Mais depuis 1850, en vertu d'une loi générale, tous les sta-
 tuts sont censés publics, à moins que le contraire n'y soit dé-
 claré.

Les auteurs nous disent quel était l'effet de cette clause dans
 les statuts privés, et quel est maintenant l'effet de cette loi qui
 déclare tous les statuts publics.

Dwarris, on statutes, p. 472 : "The clause that the act is
 "declared to be a public act is intended for the facility of proof;

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"it will not give the act the effect of a public act for *other purposes*."

Hardcastle, p. 479: "For *purposes of judicial notice*, all acts passed after 1850 are deemed public acts, unless the contrary is declared therein."

p. 482: "But though the act be public, said Lord Alvanley, (*parlant d'un acte spécial*) it is of a private nature. The only object of the provision for making it a public act is that it may be judicially taken notice of instead of being specially pleaded. But it has never been held that an act of a private nature derives any additional weight or authority from such a proviso, etc."

Dwarris, p. 651: "Whether an act is public or private, said Wigram in the late case of *Dawson vs Paver*, ⁽¹⁾ does not depend upon technical considerations (such as having the clause that the act shall be deemed a public act), but upon the nature and substance of the act." Voir *La Cie d'Éclairage, etc St Hyacinthe & La Cie des pouvoirs hydrauliques de St Hyacinthe* ⁽²⁾.

Les autorités que je viens de citer démontrent qu'il ne suffit pas qu'un acte soit déclaré public pour qu'il affecte les droits des tiers. Tout dépend de la nature même du statut.

D'ailleurs, le législateur, suivant moi, s'est exprimé de manière à enlever tout doute sur ce point.

Les droits des tiers, dit l'art. 10 du code civil, ne sont pas affectés, à moins que l'acte ne soit *public et général*. Ils ne sont pas affectés, dit la section 14 St. Ref., si l'acte est de *nature privée et locale*. Il faut donc que l'acte soit général pour qu'il affecte les droits des tiers. S'il est local, il ne peut les affecter.

Hardcastle définit le statut général et le statut local, p. 66:

"General—With reference to the whole empire.

"Local—Relating to a *subordinate area*."

(1) 5 Hare 434.

(2) 25 C. S. C. 168.

" Local acts, which constitute a special public law for a particular area, but applies to an enormous number of acts relating the railways, waters, assurances, and other companies" p. 64-65.

" Many acts included in the public, general statutes are, if public, *not general*, being confined to a particular area" p. 477.

La sec. 14 des St. Ref. qui s'applique plus spécialement à l'interprétation des statuts me semble encore plus claire que l'art. 10 du C. C.

D'après cette clause, en effet, il importe peu de savoir si le statut est déclaré ou considéré public, il s'agit seulement de savoir s'il est de nature privée et locale.

S'il appert qu'il est *de nature privée et locale*, il n'affecte pas les droits des tiers.

Or, le chap. 62 du statut Ed. VII est, comme je l'ai expliqué, un statut de nature privée, il est aussi d'une nature locale puisqu'il n'a son application que dans une certaine étendue de territoire, "particular area," dans la ville de Chicoutimi.

Il ne peut donc affecter les droits des tiers.

Les auteurs nous donnent la raison de cette règle.

" The reason of the rule, dit Dwarris, p. 470, is apparent, and the rule itself is founded in wisdom and justice. Every person is considered as assenting to a public act, but it is a rule that private acts, introduced only for the settlement of particular estates, ought to be considered merely as *common conveyances*, and therefore they cannot be taken to extend as a discharge of any person's right not mentioned in the act."

L'auteur cite les autorités précédentes et ajoute : "Suppose a statute notes that whereas there was a controversy concerning land between A and B and enacts that A shall enjoy it, this would not bind the interest of third persons in that land, because they are not strictly parties to the act but strangers, and it would be manifest injustice that the statute should affect them."

Le chap. 62, sec. 19, après avoir déclaré que les rues et terrains réservés pour les rues sont la propriété de la ville de Chicoutimi, fait une exception pour une partie de la rue

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Montcalm et du terrain réservé pour cette rue qu'il déclare être la propriété de la compagnie de pulpe de Chicoutimi.

Cette section a été insérée dans le statut pour déterminer les droits respectifs de la ville et la compagnie de pulpe sur certains terrains, et la ville et la compagnie de pulpe sont certainement liées par ce statut, mais ce statut ne va pas plus loin, et, comme dans l'exemple ci-dessus cité, (controversy concerning land between A and B), il ne peut affecter les droits des tiers sur ces terrains, ni les droits du demandeur qui n'est pas mentionné, ni partie dans le statut. "It would be a manifest injustice that the statute would affect them."

On suppose avec raison que si les tiers avaient été mentionnés dans le statut lorsqu'il a été présenté, la législature ne l'aurait pas passé sans les entendre.

On a prétendu que le statut en question qui affecte la corporation de la ville de Chicoutimi doit affecter en même temps les contribuables de la dite ville, y compris le demandeur qui y possède des propriétés immobilières.

Je ne suis pas de cet avis.

La corporation est une personne morale absolument distincte des individus qui la composent. Ses droits ne sont pas les mêmes que ceux des particuliers ou des contribuables. Les contribuables ont leurs biens et la corporation a les siens.

Le statut en question ne concerne pas les droits ou les biens des contribuables, il ne concerne que les deux corporations, la corporation de la ville et la compagnie de pulpe. Le but de ce statut était de régler entre ces deux corporations la question de propriété de certains terrains. Tel terrain, dit le statut, sera la propriété de la ville, tel autre ne sera pas la propriété de la ville, mais celle de la compagnie de pulpe. Pour ce qui regarde ces deux corporations la question est réglée. Mais le statut n'a pas eu pour but de disposer et il n'a pas, en fait, disposé des prétentions que des tiers, des particuliers ou des contribuables pouvaient avoir sur ces terrains, puisqu'il n'est pas question d'eux.

Supposons que, dans un contrat, la corporation de la ville ait vendu à la compagnie de pulpe un terrain qui appartienne réellement à un contribuable, prétendra-t-on que ce contribu-

able est lié par ce contrat et qu'il a perdu ses droits. Evidemment non.

Que la chose se soit faite par statut privé au lieu d'un contrat, peu importe, car un statut privé, comme je l'ai déjà démontré, est toujours considéré comme un contrat (conveyance), qui ne lie que ceux qui y sont parties ou qui y sont expressément mentionnés.

On a aussi prétendu que les terrains en question en cette cause étant décrits spécialement dans le statut, ce statut affecte tous ceux qui ont des prétentions sur ces terrains.

Ce que j'ai déjà dit fait justice, suivant moi, de cette prétention. Pour que le statut affecte ceux qui avaient des prétentions ou des droits sur ces terrains, il faut que ces tiers y aient été expressément mentionnés.

Dans le cas supposé par Dwarries, il est question d'un terrain en difficulté entre A et B, et qui est déclaré par le statut être à A ; il s'agit évidemment d'un terrain déterminé, et cependant l'auteur ajoute : " This would not bind the interest of " third parties in that 'land, because these are not strictly " parties to the act".

Hardeastle, p. 481, cite une décision qui fait voir combien les tribunaux sont sévères dans l'application de la règle que les droits des tiers ne doivent pas être affectés par les statuts privés.

" There a bankrupt under the provisions of a special act " assigned a patent which he had obtained before his bankruptcy. The Court held that the patent had prior to the act " vested in his assignees, and that the act did not enlarge his " title, though it decided that it was vested in the bankrupt " Lord Alvanley said : " But though the act be public, " it is of a private nature. The only object of the proviso for " making it a public act is that it may be judicially taken notice of, instead of being specially pleaded. But it has never " been held that an act of a private nature derives any additional weight or authority from such a proviso. It is not " then possible to consider this act as giving any title to Koops " (the bankrupt) which he had not at the time when it was " passed. Such has been the construction which has always

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" been put upon acts of this nature." The same view was held by Lord Tenterdeen and by Lord Abinger, etc.

Et s'il était vrai que le chapitre 65 est un statut public et général, on ne pourrait, dans tous les cas, prétendre que cette partie du statut qui déclare que certains terrains y mentionnés sont la propriété de la compagnie de pulpe, n'est pas de nature privée et locale, puisqu'il ne s'agit dans cette partie que de déterminer les droits de propriété d'une corporation privée sur les dits terrains.

Un statut, comme le dit Hardcastle, p. 484, peut être en partie public et en partie privé ; il peut être général en partie et particulier (*particular*) dans une autre partie. Cela a été reconnu bien des fois. Et dans ce cas, ce sont évidemment les règles d'interprétation des statuts privés qui s'appliquent à la partie du statut qui est de nature privée. Il faut donc en venir, dans tous les cas, à la conclusion que le chap. 62 ne peut affecter les droits des tiers qui n'y sont pas mentionnés.

Quant au chap. 85, 4 Ed. VII, les autorités que j'ai citées ci-dessus font voir que ce statut est évidemment un statut de nature privée et locale qui ne concernait que la compagnie de pulpe et la Royal Trust Co, et qu'il ne peut affecter les droits des tiers.

Je conclus donc que ces statuts n'ont nullement affecté les droits du demandeur sur ces terrains.

Etant d'avis que le demandeur a établi son droit d'action, et que la défenderesse et l'intervenant n'ont pas établi les moyens invoqués par eux, je dois maintenir l'action, avec dépens.

L. G. Belley, pour le demandeur.

G. G. Stuart, C. R., conseil.

Belleau, Belleau & Belleau, pour le défendeur.

C. Lanctot, C. R., pour la Couronne.

NOTE.—Il a été interjeté appel de ce jugement devant la Cour du Banc du Roi.

(*La rédaction*).

SUPERIOR COURT.

MONTREAL, June 23rd 1906.

Present :—DOHERTY, J.

CUILLERIER v. ROY & SILATEUX ET VIR.

*Procedure—Execution of judgments—Seizure of movables.
Establishment owned by married woman and carried on
under the name of her husband — Judgment obtained
against husband for injury for which wife is liable—
Opposition to seizure—Estoppel.*

HELD :—A married woman who, without registration, for years carries on business under the name of her husband whom she allows to hire employees and to deal with them and the public as if he were the owner of her establishment, who allows a suit to be brought and judgment to be recovered against him by an employee for damages caused by an injury for which she is liable, is estopped from opposing the seizure under such judgment of the movables in the establishment in question.

DOHERTY, J. :—

The plaintiff having recovered a judgment against the defendant for damages caused by an injury he sustained while employed in the establishment carried on by the defendant, proceeded to execute it by the seizure of the movable property in the premises. The opposant, the wife separate as to property of the defendant thereupon made an opposition to the seizure on the ground that she, and not the defendant, was the owner of the goods seized. The plaintiff contested the opposition and after having examined the opposant under oath, he moves for the rejection of the opposition as futile and made solely for the purpose of retarding the execution of the judgment.

The facts proved by the admissions of the opposant are as follows :

She, for years, carried on business under the name of J. C.

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Roy, her husband, with no addition to indicate it was not he alone who did the business. She made no registration of the name as her business name ; the business was actually carried on by her husband, as she says, as her attorney, but without any written power of attorney. The plaintiff was employed in the establishment so carried on in the name of J. C. Roy, and there suffered the injury for which he has obtained judgment for damages, against J. C. Roy, which judgment he seeks to execute upon the goods in the business establishment which, as well as certain household effects, also seized, the opposant claims as her property, and seeks to withdraw from the seizure. She had knowledge of the present suit brought against J. C. Roy, as proprietor of the establishment, it was served at her domicile, she took no step to undeceive the plaintiff, who, if her statements are true, was her employee and to whom she, if any one, was responsible for the injury he sustained, but allowed her husband to defend the suit as the real proprietor of the establishment, and the plaintiff to act upon the erroneous belief, which, by her conduct, she had led him into and proceed to judgment against her husband, as being the J. C. Roy who owned and carried on the establishment, whereas, as by her opposition she now contends, she was the "J. C. Roy " who so owned and carried it on, her name for the purposes of the business and all matter connected therewith being, by her own choice, J. C. Roy. Having so acted, the opposant must be held bound by what was done under the circumstances by and against her husband and agent and factotum acting under her business name, and cannot, after having allowed him to stand forward to all the world and to the plaintiff in particular, as the real owner of and person responsible for the establishment, and thus led the plaintiff into treating him as such, and exercising against him the rights which he had against such owner and person responsible, nor step in to prevent, upon the ground that not her husband, but she is responsible, execution upon what she alleges to be her goods, to wit, the goods of such owner and person responsible, of the judgment obtained against her husband in that quality, which

she allowed him to assume. To allow her to do so would be to allow her to take the position that the business was her husband's—so far as its obligations and liabilities were concerned, and hers so far as its assets and the benefits to be derived from it were concerned. Having allowed judgment to go against "J. C. Roy," who carried on the business and establishment, she cannot now, by merely saying I, and not my husband, am that J. C. Roy, and you, the plaintiff, should have sued, not him, but me, as doing business under that name, prevent the execution of the judgment so obtained upon the assets and property of herself, who, on her own showing, is the real J. C. Roy. Further, having carried on business in her husband's name, she cannot be heard to complain, but must submit to the obligations incurred in the course of her business, being enforced against her in her husband's name. The circumstances as revealed by the deposition of the opposant and the record herein, make it unmistakably clear that the sole purpose of the registration made by the opposant of a declaration of her alleged business name of J. C. Roy & Co., the day after judgment had been rendered in this cause (as she "*says pour me retirer,—pour que j'aie des droits, moi*"—and because "*j'ai des enfants et j'ai pensé à mes enfants et j'ai pensé à moi-même en même temps,*") and the present opposition were both made for no other purpose but to unjustly retard the execution of the judgment by a futile endeavour to prevent what she says are her goods being sold in execution of a judgment for an injury for which she—on her own showing—is responsible and a judgment which, if she is telling the truth, is not against her by name merely because by her conduct she led the plaintiff into the mistake of believing that her husband and not she was "J. C. Roy," and a judgment which, obtained under the above circumstances was—if, as the opposant contends, she and not her husband was the owner of the establishment—in effect obtained against the opposant, and is as binding upon her as if her own name had figured in the proceedings instead of that of her husband and *prête-nom*, she having been and being, on her own showing,

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notwithstanding the use of her husband's name, the real defendant in the case (20 Laurent, 117).

Having held out her husband as being the real owner of the business and its assets, and allowed him to hold himself out as such, to the world in general and to the plaintiff in particular, and thereby induced the plaintiff to take judgment against him as such, she must take the consequences of her acts. (Tropiong, Mandat No 556), and allow him to figure as owner of the business and its assets for the purposes of execution, as she did for the purpose of the plaintiff's action and judgment, and by her own actions and conduct she is now estopped from coming forward to assert a right of ownership of the assets and business herself, for the purpose of withdrawing them from seizure in execution of the judgment.

For this reason, even if the fact that her husband is nominally the defendant in this cause, should be considered as presenting an obstacle to the judgment being executed upon her assets generally—she is manifestly without right to withdraw from the seizure herein the assets of the business, to wit, the stock-in-trade, machinery, etc, in the place of business and establishment wherein the business was carried on.

While this last mentioned reason puts beyond possibility of question the utter futility of her opposition as regards the last mentioned assets, the reasons which preceded it make it sufficiently clear, as above set forth, that the entire opposition is unfounded ; that the opposant has no grievance other than that her obligation is being enforced against her, not under her own, but under her husband's name, a condition of affairs of which—even if it caused her prejudice, which she does not allege—she is without right to complain of, since she herself is responsible for its existence, and that the opposition has had no other purpose than to unjustly retard the execution of the judgment herein, to justify the dismissal of the opposition in its entirety. The plaintiff's motion is maintained, and the opposition is dismissed with costs.

Beaudin, Loranger & Saint Germain, for the plaintiff.
Murphy & Roy, for the opposant.

COUR DE RÉVISION.

MONTREAL, 30 juin 1906.

Présents:—SIR MELBOURNE M. TAIT, Juge en chef,
LORANGER ET PAGNUELO, JJ.

OWENS v. CONWAY & CONWAY, Oppt.

*Procédure—Exécution des jugements—Saisie immobilière—
Deuxième bref de terris émis avant satisfaction d'un
premier bref de bonis et de terris—Nullité de la saisie.*

JUGÉ:—Lorsqu'un bref de saisie mobilière et immobilière (*de bonis et de terris*) a été émis en exécution d'un jugement, il reste en vigueur tant qu'il n'a pas été satisfait, ce qui empêche l'émission d'un nouveau bref. Par suite, la saisie immobilière pratiquée en vertu d'un deuxième bref émis avant que le premier ne soit épuisé, est nulle.

PAGNUELO, J., *dissentiente*.

Le jugement inscrit en révision et qui est confirmé, a été rendu en Cour Supérieure, TASCHEREAU, J., à S^{te} Scholastique le 23 décembre 1905.

LORANGER, J. :—

Le demandeur a fait émettre un bref *de bonis et de terris* contre le défendeur. Ce bref n'est adressé ni au shérif ni à aucun huissier du district.—(art. 617 C. P. C.). Il a été remis à un huissier qui, par son procès-verbal, rapporte avoir saisi certains meubles et animaux dont il donne l'énumération, et, "many other articles too numerous to mention." Aucun gardien n'a été nommé. "The defendant having failed and being unable to procure one, I did take the articles seized in my own charge."

Deux oppositions furent faites à la saisie mobilière, l'une par le fils du défendeur qui réclame les biens saisis comme sa propriété, et l'autre par le défendeur se plaignant des irrégularités que je viens de mentionner invoquant en outre des moyens

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de fonds, sur lesquels la cour n'a pas jugé à propos d'adjudger en première instance.

La contestation fut liée sur ces deux oppositions et pendant l'instance, le demandeur a fait émettre un second bref *de ter-ris*, adressé au shérif du district de Terrebonne. Le défendeur a produit une seconde opposition, se plaignant que ce bref est prématuré, attendu que ses meubles n'ont pas été discutés et que l'on aurait dû attendre l'issue du procès sur l'opposition à la vente des meubles, avant de faire saisir ses meubles (art. 614 C. P. C.).

Le demandeur répond que la discussion des meubles a été arrêtée par le défendeur lui-même, et qu'il n'était pas tenu d'attendre le résultat du procès que ce dernier avait suscité.

La cour a jugé en première instance que le premier bref *de bonis et de terris* était radicalement nul, parce qu'il n'était adressé à personne, et conséquemment que l'huissier qui l'a exécuté n'avait aucun pouvoir ; que la saisie elle-même était nulle en autant que le procès-verbal n'énumère pas les objets saisis, et que l'huissier a pris les effets saisis sous ses soins sans les faire enlever et les placer en lieu sûr (art. 628, 630 C. P. C.).

La cour a adjugé par le même jugement sur l'opposition à la saisie immobilière qu'elle a aussi maintenue pour les raisons énoncées dans l'opposition.

Le demandeur se pourvoit en révision contre le jugement rendu sur l'opposition à la saisie immobilière.

Ce jugement me paraît conforme à l'article 614 C. P. C. La vente des immeubles ne peut être faite qu'après la discussion des meubles. L'objection du demandeur, que la vente des meubles a été retardée par l'opposant lui-même, ne peut tenir sous les circonstances particulières de la cause. La saisie des meubles était nulle, et le bref était aussi radicalement nul. Il est censé n'avoir pas existé. La cour en a jugé ainsi sur l'opposition à la saisie mobilière, et il n'y a pas appel de ce jugement.

Au reste la prétention du demandeur fut-elle fondée, que l'opposant devait encore réussir. Le premier bref *de bonis et de*

terris était encore en force lorsque le second bref *de terris* a été émis et aux termes des articles 603-604 C. P. C. Aucun autre bref ne pouvait être émis avant que le premier fut expiré.

Le jugement est confirmé.

F. D. Leduc, C. R., pour l'opposant.

R. P. De la Ronde, pour le demandeur contestant.

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COURT OF REVIEW.

MONTREAL, September 29th 1906.

Present:—SIR MELBOURNE M. TAIT, Chief Justice,
LORANGER & HUTCHINSON, JJ.

*Liability for tort—Libel—Prima facie innocent publication
Failure to prove innuendo of their meaning.*

MORRELL v. GRANT.

HELD:—An action for libel will be dismissed when the publication complained of does not on the face of it apply to the plaintiff and he fails to prove the *innuendo* that it was meant to apply to him.

The judgment inscribed for Review was rendered in the Superior Court, SAINT-PIERRE, J., on the 26th of February 1906, as follows :—

SAINT-PIERRE, J. :—

Whereas the plaintiff alleges that he is an optician, and a dealer in optical supplies, doing business in Montreal, and that the defendant is an optician, and a dealer in optical instruments doing business in Montreal ; that on the 18th June 1905, the plaintiff caused an advertisement, advertising gold eye-glasses for sale at \$2.98, to be inserted in the Montreal Star, a newspaper published in Montreal and circulated in Montreal and throughout the Dominion of Canada and the United States ; that on the following day the defendant caused to be

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inserted in the said newspaper an advertisement ended as follows : "THE PUBLIC WARNED. I see that gold eyeglasses, "(whatever that may mean) are advertised at \$3.00. Now, "I won't be undersold by Jew or Gentile. I can sell you gold "glasses at \$2.50, but I won't do it, simply because my cons-
 "cience will not allow me to ruin your sight. They offer to
 "examine eyes, (worry the eyes they mean) free, I don't, that's
 "the difference ; but what do these charlatans care so long
 "as they sell you their glasses and pocket your money. Prof.
 "Grant, B. O. A. 2172, St Catherine street, opposite Bible
 "House, Prof. Physiological and Applied Optics, Optical In-
 "stitute of Canada" ; that said advertisement as inserted was
 a libel on the plaintiff, and has caused damage to the plaintiff
 to the extent of \$500.00 ; that said advertisement was in-
 serted by the defendant maliciously and with the intention
 of damaging the plaintiff's reputation, and injuring his
 business.

Whereas the defendant pleads a general denial.

Considering that the plaintiff has proved the essential
 allegations of his declaration, and that his claim for damages
 should be sustained, but not to the amount claimed.

Doth dismiss said plea and doth adjudge and condemn the
 defendant to pay and satisfy unto plaintiff the sum of \$25.00
 and costs of an action of the lowest class in the Superior
 Court.

JUDGMENT OF THE COURT OF REVIEW.

SIR M. M. TAIT, CH. J.: —

This inscription is from a judgment of His Lordship Mr Jus-
 tice Saint-Pierre, rendered in the Superior Court, the 23rd day
 of January, 1906, maintaining the plaintiff's action for \$25.00
 and costs of a Superior Court action of the last class.

By the action the plaintiff claimed damages for an alleged
 libel contained in an advertisement published in the Star
 newspaper, Montreal, on the 16th June, 1905, and worded as
 follows :

"The public warned."

"I see that eyeglasses (whatever that may mean) are advertised at \$3.00. Now, I won't be undersold by Jew or Gentile. I can sell you gold glasses at \$2.50, but I won't do it, simply because my conscience will not allow me to ruin your sight. They offer to examine eyes (worry the eyes they mean) free. I don't, that's the difference, but what do these charlatans care, so long as they sell you their glasses and pocket your money.

Prof. Grant, B. O. A.,
2172 St Catherine street,
Opposite Bible House.

Prof. Physiological and Applied Optics, Optical Institute of Canada."

It was alleged by the declaration that the above advertisement was published by the defendant for the purpose of "reflecting on the advertisement previously published in the Montreal Star by the plaintiff and with the intent to damage the plaintiff's reputation, injure his business and prevent him from competing with the defendant in business as an optician, and dealing in optical instruments and supplies."

The advertisement to which the defendant was said to be an answer was alleged to have been inserted by the plaintiff the day previous, in the same paper (The Montreal Star), and was as follows:

"All this week."

"We will continue our sale of \$5.00, \$7.50 and \$10.00 Gold glasses at \$2.98.

"Every article of metal in the frames is warranted finest gold, and set with finest quality of imported lenses. The clips are the new kind, that cannot slip, and do not disfigure the nose. They are the most stylish glasses made. Every eyeglass and spectacle wearer should take advantage of this sale, as they are guaranteed the finest glasses made, and are sold by regular opticians at from \$5.00 to \$10.00.

"Have your eyes examined free by our eye specialist, Prof. Morrell, who has fitted thousands with glasses to their entire satisfaction. Not more than two pairs to a customer. Mail orders filled."

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The declaration goes on to allege that the advertisement, inserted by the defendant, was a libel on the plaintiff, and, by reason of its publication, caused him damage.

The plea denies all the essential allegations of the declaration, except that the advertisement complained of was published by the defendant. The essential allegations of the declaration are that the advertisement was inserted by the defendant maliciously in answer to the plaintiff's advertisement of the previous day, and with the intent to damage the plaintiff's reputation and injure his business.

The plea is that the advertisement complained of had no reference whatever to the plaintiff or to the advertisement which he claims as his. The essential allegation of the action is paragraph 3, already referred to. It says :

"That the said advertisement was inserted by the defendant "maliciously as reflecting on the advertisement previously inserted in the said Montreal Star by the plaintiff, and above "referred to, and with the intent to damage the plaintiff's reputation," etc, or, in other words, that the advertisement of the defendant was an answer to the advertisement of the plaintiff, and was intended to injure him. It is evident that without this, or some other allegation to the same effect, there would have been no action whatever, and the burden of proof was on the plaintiff to prove this allegation. If he failed to prove it he fails in his action, and it should be dismissed. There is not a word of proof to sustain this allegation. On the contrary, it is absolutely proved that in inserting the advertisement complained of, the defendant did so in the ordinary course of business ; that he meant no reference to the plaintiff whatever ; that he had not seen his advertisement, and, moreover, that as the Star of the 15th June, in which it was contained, only reaches his office between four and five o'clock in the evening, that it was impossible for him to have replied to it with the advertisement complained of the next day. It is a singular coincidence, but merely a coincidence, that the advertisement published by him should appear so much like an answer to the one published by the plaintiff, but, in face

of his denial, no presumption founded on the coincidence can prevail.

Nevertheless the Court below finds that the plaintiff has proved the essential allegations of his declaration, and sustains his claim for damages to the amount of \$25.00, with costs of an action of the lowest class in the Superior Court.

The defendant pretends that the judgment was manifestly wrong, inasmuch as it must be proved that the plaintiff is the person libelled. This is fundamental, and the English and French authorities are to the same effect.

There is no proof here that the plaintiff was the person libelled or referred to. Although the advertisement of the defendant has the appearance of being an answer to that of the plaintiff, the plaintiff's name is not mentioned in it, nor is there anything to connect the plaintiff with it from first to last. The defendant's advertisement says :

"I see that gold eyeglasses (whatever that may mean) are "advertised at \$3.00."

In the plaintiff's advertisement they are not advertised at \$3.00 but at \$2.98. Then it goes on to say :

"Now, I won't be undersold by Jew or Gentile." It turns out that the plaintiff is a Jew, but there is nothing to show that the defendant knew that or that he knew the plaintiff at all. There is no mention of the advertisement in the Star or of Hamilton's advertisement, nor even that it was in Montreal, that the defendant saw gold eyeglasses advertised at \$3.00, nor when he saw them. He swears that he could not have seen the advertisement in which the plaintiff's name appears before he wrote his own as he would not get the Star in time to do so. He is not contradicted in this point, although he is examined at great length both on discovery and at the trial, in order to trap him into an admission that he had seen the Star and the plaintiff's advertisement. He makes no such admission even by inference, and his evidence must be taken as conclusive in the absence of proof to the contrary.

Furthermore, he produces the book in which he keeps a record of his advertisements in which it is shown that the advertisement complained of was one of those published in the

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regular course of his business and in the same language as he has been using from time to time for years. Thus, on page 57 of that book, in an advertisement published over three years ago, he says :—

“ We won't be undersold by Jew or Gentile. Our prices “ always have been,” etc., and in another one, published four years ago, on the next page, he says :—

“ But what does the spectacle peddler or mushroom opti-
“ cian care, so long as he sells you his worthless spectacles and
“ pockets your money.”

The same language is used on page 48, in an advertisement headed : “The Latest Optical Fake,” and again at page 45, in an advertisement headed : “The Public Sight in Danger,” we have the very same language as is complained of in this case, namely :

“ But what do these charlatans care, so long as they can
“ sell their worthless spectacles and pocket your money.”

It was for the plaintiff to prove that the defendant's advertisement referred to him, and that he utterly failed to do, and any proof on the defendant's part should have been unnecessary, but in order to rebut any inference which might arise from the apparent connection between the two advertisements and also from the proof made by the plaintiff from a number of newspaper men that they could find no other advertisement in the files of their papers to which it could be an answer, the defendant undertook to show, and has shown in a most conclusive manner, that his advertisement was published in the regular course of his business and used the same language that he had been accustomed to use, and that the presumption that it had any reference to the plaintiff's advertisement was entirely unfounded.

Under the circumstances, this Court is unanimously of the opinion that the trial judge was in error. His judgment is reversed, and plaintiff's action is dismissed with costs of both Courts.

Trihey, Bercovitch & Ogden, for the plaintiff.
Stephens & Harvey, for the defendant.

SUPERIOR COURT.

MONTREAL, June 20th 1906.

Present :—DOHERTY, J.THE CORPORATION OF THE PARISH OF
ST LAURENT v. ROY.

Procedure—Jurisdiction of Courts—Municipal law—Violation and enforcement of by-laws—Ultra vires—Imposition of fine and imprisonment in default of payment, under power to impose fine or imprisonment.

HELD :— 1o. While a municipal corporation may, like any other person, seek redress by action before the Courts of a specific wrong done it, in violation of the law, the Courts have no jurisdiction, in the absence of such a wrong, to deal with a demand upon them by such a corporation to restrain breaches of its by-laws, or to authorize it to prevent them by physical means.

2o. The Superior Court has jurisdiction of actions to recover penalties imposed by municipal by-laws, when of an amount of one hundred dollars in Montreal and Quebec and of two hundred dollars in the other districts.

3o. A municipal by-law which imposes a fine and imprisonment in default of payment does not conform to the law which authorizes the imposition of a fine not exceeding a given sum, or an imprisonment not exceeding a given number of days; it is therefore null and void and cannot be enforced by action.

DOHERTY, J. :—

The plaintiff sues to recover from the defendant \$180, to have him condemned to at once cause to cease the unwholesome odors that are emitted from an establishment carried on by him within the limits of the municipality, to cease operating the establishment, to have him ordered to cease to bring, deposit and leave within its limits detritus or remains of dead animals, offal of such dead animals, dead bodies and other deleterious substances in contravention of by-law No 15 of the plaintiff, and that in default of the defendant's immediately ceasing to carry on the establishment and putting an end to the odors

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the plaintiff be authorized to put an end thereto at the expense of the defendant, and to use its own words, that the plaintiff is since the fifteenth September, 1905, owner of a factory shop and depot within the parish of St Laurent and carries on the same, boiling therein bones and remains of dead animals, manufacturing soap and candles and melting tallow and fatty substances ; that within and around the establishment are constantly large heaps of putrefying remains of animals which the defendant uses in his business, and that the establishment and heaps of remains constantly send forth unwholesome and nauseating odors which are a source of danger to public health and particularly the health of the inhabitants of the parish ; that the establishment has been defectively built with wooden floors and the blood of these putrefying animals spreads over and impregnates the wooden floors and the ground, and sends forth unendurable odors ; that moreover the defendant transmits the waste matters from dead animals and the putrefied blood through an insufficient drain which allows the same to spread over the ground for a distance of some 1,000 feet from the factory endangering the public health and preventing adjoining proprietors making wells should they so desire ; that the above described state of affairs exists continuously since the 15th September, 1903, and obliges neighboring residents to keep doors and windows closed and is unendurable ; that on the 11th September, 1903, the plaintiff protested the defendant before he began carrying on his establishment and when he was beginning to build it, notifying him that it had been informed that he intended building a factory for the purpose of bringing thereto and consuming therein dead bodies, in contravention of article 62 of the rules of the council of health, of the dispositions of article 191 of 55-56 Vict. C. (Canada) and of article 649 of the municipal code, and notifying him further to cease building and all work in contravention of said laws ; that on the 16th September, 1903, the council of the plaintiff passed a by-law numbered 15, decreeing as follows : "Il est par les présentes défendu de faire dans les limites de cette munici-

“ palité des dépôts de substances ou matières émanant des gaz
 “ ou odeurs infectes, tels que huile de charbon, superphos-
 “ phate de chaux en état de fabrication, détritrus ou restes d’a-
 “ nimaux morts, déchets, immondices, contenus de latrines et
 “ autres matières semblables, et d’emporter, déposer ou laisser
 “ dans les limites de cette municipalité ou dans les eaux qui
 “ la bordent des corps morts et autres substances délétères.”

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That this by-law was duly promulgated, and came into force on the 27th of October, 1903, that in contravention of it the defendant on the following dates and each of them, to wit, the 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd and 24th November, 1903, has brought, deposited and left in the limits of the municipality, dead bodies and made deposits of detritus and remains of dead animals and waste matters coming from the animals ; that the defendant has thereby incurred a penalty of \$20 for each of these days, amounting to \$180, which the plaintiff is entitled to recover from him ; that the constructions aforesaid and the acts aforesaid of the defendant constitute a public nuisance ; that the plaintiff is not bound to receive within its limits dead animals coming from the city of Montreal ; that none of the dead animals above referred to came from the municipality plaintiff ; that the defendant has ever since the 15th September, 1903, violated the by-law each and every day ; and persists in doing so, though notified to desist.

The defendant pleads denying the plaintiff’s material allegations, but admitting as set forth in the declaration that he boils the bodies of dead animals in a building owned by him in the municipality, and alleging that the by-law invoked and against him is illegal, null and of no effect, not complying with the formalities required by law, and specially because, in passing it, the council of the plaintiff legislated on matters not within its competency, particularly as regards that portion of the by-law which prohibits the bringing into the municipality of dead bodies and other deleterious substances ; that he has contravened no legally enacted by-law of the plaintiff,

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and that the plaintiff's action is unfounded ; and the defendant concludes praying the dismissal of the action and subsidiarily that it be declared that the plaintiff, through its council, in adopting the alleged by-law, did not comply with the essential formalities prescribed by law, and that the council exceeded the powers conferred on it, and that the by-law is null and of no effect, being *ultra vires*.

In so far as the plaintiff, by its action, complains of the acts imputed to the defendant as being violations of the criminal code, of the rules of the council of health, and of the by-law alleged, and constituting a public nuisance, and in consequence prays that this Court order the defendant to desist from such acts, and failing his doing so, authorize the plaintiff to put an end to the defendant's alleged establishment ; it forms no part of the functions of this Court to enforce obedience to the criminal law, to the rules of the council of health, or of the municipal by-laws by means of an order such as that asked for at the instance of a municipality, as such.

If by such acts constituting a nuisance or being violations of such laws, rules or by-laws, and as such unlawful, a municipal corporation suffers damage or injury in its capacity of a civil corporation, by reason of such acts causing damage to its property or otherwise, such corporation has a right, as would have any other person, to call upon this Court to restrain such unlawful acts causing damage to it in its capacity of civil corporation, but the plaintiff does not allege that it suffers any such damage as a civil corporation by the alleged unlawful acts of the defendant. It does not belong to it as a public corporation and for the purpose of enforcing obedience to the criminal law, to the rules of the health council, or to its own by-laws enacted in the exercise of the governing power delegated to it in the absence of statutory authority empowering it to do so, to call this Court to its aid and demand that this Court add to the prohibitions enacted by laws, rules or by-laws a prohibition of its own, and enforce such a prohibition by authorizing the municipal corporation to force, suppress or pre-

vent what may have been done in violation of such laws, rules or by-laws, nor has it conferred upon it by law any other power or authority to prevent or suppress public nuisances otherwise than by the enactment of such by-laws to that end, as it is authorized to pass, and by the enforcement of said by-laws, by proceedings for recovery of the penalties it is authorized to attach to their violation, or any quality in its capacity of a public corporation to call upon this Court in the interests of the general public, or of individuals, even residents in the municipality who may be prejudiced, to suppress public nuisances.

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The plaintiff's demand for an order upon the defendant, as above set forth, is for these reasons unfounded.

There remain for decision three questions, namely :

1—Has this Court jurisdiction to try and determine suits or prosecutions for violations of municipal by-laws and for recovery of penalties enacted by such by-laws ?

2—Is by-law No 15 of the plaintiff, which the defendant is accused of having violated, within the competency of the council of the plaintiff and legally enacted and in force ? and

3—Has the defendant violated this by-law and incurred the penalties sought to be recovered from him ?

The jurisdiction conferred by article 1042 M. C. upon the Courts therein mentioned for the recovery of fines under municipal by-laws is not exclusive of the jurisdiction conferred by article 48, of the code of civil procedure, upon the Superior Court, in all cases not within the exclusive jurisdiction of the Circuit Court, and in consequence leaves within the jurisdiction of this Court at the chef-lieu of each district, demands for the recovery of such fines where the amount demanded amounts to or exceeds one hundred dollars :—(*Corporation d'Irlande Nord vs Mitchell*) (1)

In this cause the amount demanded for such fines is \$150.

This Court, therefore, has jurisdiction upon said demand.

Upon the second of the questions above set forth.

(1) 13 Q. L. R. 22.

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By articles 525, 592, 616 and 650 M. C., the latter made applicable to municipal councils of all municipalities by 1 Ed. VII, chap. XIX, s. 24, the council of the plaintiff was and is authorized to make by-laws to prevent any person from carrying, depositing or leaving in the municipality dead bodies or other deleterious substances.

By-law 15, in so far as it prohibits the making deposits of substances or matters from which issue noxious gases or odors, such as coal oil, etc., and the carrying, depositing or leaving in the limits of the municipality dead bodies and other deleterious substances, is within the power by said articles conferred on the plaintiff, but as regards the penalty imposed for violation of the provisions of the by-law, the same is fine and imprisonment, in default of payment of the fine.

Under article 508 M. C., the plaintiff could impose for violation of the by-law a penalty in the shape of a fine, not exceeding twenty dollars, or imprisonment not exceeding thirty days, but it has no power to impose both.

The fact that it has imposed the additional penalty of imprisonment only in default of payment of the fine, does not alter the fact such imprisonment, though conditional, has been made an integral part of the penalty imposed by the by-law, which must, under the terms of the by-law, be imposed by any Court called upon to enforce it.

Such integral part of the penalty being beyond the power of the council to enact, no Court can impose such penalty so enacted as a whole, and it does not come within the powers of a Court called upon to enforce a by-law to divide the penalty enacted as its sanction, and impose so much of it as is legal and refrain from imposing so much of it as exceeds the legal powers of the enacting body.

The addition to the fine of an imprisonment, conditional only on defendant's failure to pay the fine, cannot be defended as being merely an unnecessary but harmless provision for the execution of a judgment condemning to a fine by the means provided by article 1,049, M. C., since a judgment rendered in the terms of the by-law would deprive the defendant of the benefit of the provisions of article 1,049, under

which he could not be imprisoned merely for non-payment of the fine, but only if having failed to pay it in fifteen days, his property being seized and sold prove insufficient to pay the sum due.

The enactment of this illegal penalty as a sanction of the by-law in question, does not merely render the by-law susceptible of being annulled for informality, but leaves it absolutely inoperative for want of any sanction—that enacted being beyond the powers of the council of the plaintiff, and it not being within the powers of the Court, to reduce it and inflict the portion of it which might have been legally enacted.

For those reasons the by-law is inoperative, and it is unnecessary to pass upon the question whether the defendant has violated it,—though that he did so, to the extent at least of bringing or carrying dead bodies of animals into the municipality, is practically admitted.

By-law No 16 of the plaintiff, a copy whereof has been produced, though it is not alleged in the declaration and no direct charge of violation of it is made against the defendant, is, even if the allegation of the declaration that the defendant makes soap and candles in his establishment be treated as a charge by him of violation of said by-law, inapplicable to the defendant inasmuch as his establishment is not alleged to be one of those prohibited by said by-law, to wit, a slaughter-house, gas works, tannery, candle or soap factory or distillery, save in so far as the allegation that he makes soap and candles therein may be considered as equivalent to a charge that it is a soap and candle factory. The allegation is not proved, and the by-law is in any event open to the same objection and inoperative for the same reason as by-law No 15 above mentioned.

The Court maintains the defendant's plea and declares by-law 15 inoperative, and dismisses the plaintiff's action with costs.

Beaudin, Loranger & Saint Germain, for the plaintiff.
Lavallée & Lavallée, for the defendant.

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SUPERIOR COURT.

MONTREAL, June 23rd 1906.

Present :—ARCHIBALD, J.

COALLIER v. ST DENIS ET AL.

Liability for tort—Interdiction for habitual drunkenness.
Family council—Privileged occasion.

HELD :—The advice given by a family council on a petition for interdiction for habitual drunkenness, is a judicial proceeding, the occasion is privileged so that no liability for their statements can be incurred by those taking part in it.

ARCHIBALD, J. :—

These are three cases of damages against the three defendants who took part in proceedings for the purpose of obtaining the interdiction of the plaintiff, and his detention in an inebriate asylum as an habitual drunkard.

Alphonse Coallier was the petitioner in the proceedings for interdiction, and J. A. Saint Charles and I. Thibaudeau were members of the family council and all were relations of the plaintiff.

The plaintiff alleges in his action against Alphonse Coallier that he was petitioner in the proceedings for interdiction which resulted in a judgment interdicting the plaintiff and condemning him to be interned in the St Benoit-Joseph asylum for the period of a year ; that these proceedings on the part of the defendant Alphonse Coallier were fraudulent and the result of a conspiracy with the plaintiff's wife and with Isaïe Thibaudeau, brother of the plaintiff's wife ; that the fraud was perpetrated by means of procuring the interdiction by contriving that the petition for it should be served upon the plaintiff, by leaving a copy thereof with his wife, and by the latter concealing from him the existence of the copy, although as a matter of fact at the time when the

petition was actually served, the plaintiff was sober and in a condition to receive service thereof, and was sober during the time between the service and the date appointed for the assembly of the family council ; that moreover the defendant, contriving to accomplish the same result, caused the notice of the family council to be sent only to such of the relatives of the plaintiff as would be favorable to the interdiction, and not to several others who would have been against it ; that as a result the family council was composed of four relatives and three friends, and by that means, the judgment pronouncing the interdiction was obtained ; that the plaintiff suffered damages by reason of the interdiction in a sum of \$5,597.94 details of which damages he gives by his declaration.

Practically the same allegations are made against the defendant Isaïe Thibaudeau.

The action against the defendant St Charles alleges partly the same facts, but as a ground of liability against him, he alleges that the defendant had no knowledge of the alleged habitual drunkenness of the plaintiff, and was not in a condition to give his opinion as a member of the family council in favor of the interdiction or the internment of the plaintiff ; that his conduct was very imprudent and inconsiderate and contributed to the judgment of interdiction, and the plaintiff claims against him the sum of \$4,097.94 for items detailed in the declaration.

The defendants all plead that they acted in good faith ; that the plaintiff was in fact an habitual drunkard ; that no conspiracy or agreement existed between them and the wife of the plaintiff, to deprive the plaintiff of the advantage of contesting the petition, and the defendants conclude for the dismissal of the plaintiff's actions.

The proof shows that the plaintiff has been in the habit for many years of taking liquor in considerable quantities. He was an employee of the government in the department of customs until three years ago, when he ceased to be such employee. His retirement was not in consequence of resignation on his part. Why he retired the proof does not establish.

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There is proof that while he was in the customs' employ he used to take, during business hours, a considerable number of glasses of rye whiskey daily. Occasionally during that period and during office hours he was more or less under the influence of liquor.

In addition to the liquor which he was in the habit of taking during office hours, he was also in the habit of drinking liquor at home during the evening. He bought, at some times at any rate, from one grocer rye whiskey at about a quart bottle per day. He was in the habit of drinking his liquor without mixture of water.

In the months of November and December 1905, there is proof that he was drinking in the evenings more than customary. Of late years, the plaintiff had been ill of a malady, which, according to the medical evidence, was probably caused by indulgence in liquor. The plaintiff is in a condition of chronic alcoholism.

The defendant Alphonse Coallier, after much hesitation, allowed his name to be used as petitioner for interdiction. He did discuss with the plaintiff's wife the question of interdiction, but he declined to be responsible for the proceedings to secure the same. It was the plaintiff's wife who settled the list of persons to be called to the family council and who gave instructions to the lawyer in the matter.

The defendant Thibaudeau also talked with the plaintiff's wife in the matter, but took no part in the selection of names to be summoned, nor in any other part of the proceedings.

The defendant Saint Charles received a summons to attend the family council, and went there and gave his advice in favour of interdiction. He had known the plaintiff as a confirmed drunkard in his opinion several years before.

No proof of malice against the plaintiff or desire to injure him has been established against any of the defendants.

There is proof, which I think is convincing, that when the plaintiff was under the influence of liquor, he acted with considerable harshness, if not with brutality towards his wife.

It is probable that the defendants' main motive, in giving

their advice in favour of the interdiction, was the feeling that the plaintiff's wife would be relieved by the internment of the plaintiff from the difficult situation in which she found herself.

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It also appears satisfactorily proved that the defendants thought that by confinement for a certain period in an inebriate asylum, the plaintiff might regain control over his appetite with regard to liquor.

It is very clearly proved that the plaintiff's habit of drinking was injurious to his health.

The article of the code which refers to the interdiction of habitual drunkards is 336-a and it provides : "May also be interdicted any habitual drunkard who squanders or mismanages his property or places his family in trouble or distress, or transacts his business prejudicially to his family, his friends or his creditors, or who uses intoxicating liquors to such an extent that he thereby incurs the danger of ruining his health or shortening his life."

In this case it has not been proved that the plaintiff did dissipate his property or badly administer it, but it is proved that his condition was very troublesome to his wife and was very injurious to his health.

The interdiction, however, was obtained without his having received notice of it, and also with only four relatives and three non-relatives, although there were a sufficient number of relatives in the district who were not summoned, to take the places of the friends who formed part the family council.

A *requête civile* was taken against the interdiction and judgment was allowed to be pronounced by consent upon said *requête*, setting aside the interdiction.

The defendants were acting in a quasi-judicial capacity, taking part in the administration of justice to a certain extent in the same manner as a juror called in a criminal case takes part therein. The responsibility of persons in that position for damages to the individuals who may be affected by their action is well known. In order that such responsibility should attach, there must be positive malice and want of

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probable cause in the action complained of. It may be noticed that in the declaration against the defendant Saint Charles, no want of probable cause is even alleged, much less proved. That action on its face is unfounded, and must be dismissed with costs.

The other defendants as well as Saint Charles gave their advice under oath.

I would quote a clause from Odgers on Libel and Slander, 4th Edition, page 420 under the heading "Judicial Proceeding" as follows : " No action will lie for defamatory statements made or sworn in the course of a judicial proceeding before any Court of competent jurisdiction. Everything said by a judge on the bench, a witness in the box, the parties of their advocates in the conduct of the case, is absolutely privileged, so long as it is in any way connected with the inquiry. So are all statements contained in documents necessary to the proceedings, such as writs, pleadings and affidavits. This immunity rests on obvious grounds of public policy and convenience. It attaches to all proceedings taken before any person who lawfully exercises judicial functions, whether he be technically a judge or not, provided he is acting in his judicial capacity and not merely in the discharge of some administrative duty."

At page 226 another remark occurs as follows : " Any observation made by one of the jury during the trial is equally privileged, provided it is pertinent to the inquiry. And so is any presentment by a grand jury."

It appears to me that applying this doctrine, which is I think clearly the only doctrine consistent with the existence of judicial proceedings with any efficiency, the actions against the three defendants in this case are wholly unfounded, and they are to be dismissed with costs.

Beaudry & Beaudry, for plaintiff.

M. G. La Rochelle, for defendants.

SUPERIOR COURT.

MONTREAL, June 29th 1906.

Present :—SAINT-PIERRE, J.

LÉONARD v. RAMSAY ET AL.

*Liability for tort—False arrest—Want of probable cause—
Workman not complying with orders — Suspicion of
theft—Liability of corporation for act performed under
instructions from its vice-president and local manager.
Contributory negligence affecting measure of damages.*

Held :—10. When the servants of a plate glass company are instructed to always bring back to its shop the old plate glass removed upon a new one being put in, or report their reason for not doing so, the failure to comply with such orders is not sufficient of itself to justify a charge of theft against them. In such a case, the employer should make further inquiries and if he prefers a charge without doing so, he will be held to have acted without probable cause.

20. A corporation is liable in tort for false arrest when the charge is laid under instructions from its vice-president and local manager.

30. Disobedience to orders by which an employee lays himself open to a suspicion of theft, amounts to contributory negligence and will be so considered in assessing the damages caused him by an arrest upon an unfounded charge for that offence.

SAINT-PIERRE, J. :—

This is an action for false arrest. The plaintiff claims damages to the amount of five thousand dollars. The action, which is directed against two defendants Alexander Francis Ramsay and the Consolidated Plate Glass Company, had its origin in the following circumstances :—Alexander Francis Ramsay is the son of Alexander Ramsay, the well known paint merchant, of Montreal, who has his store at the corner of St Paul and Inspector streets. Alexander Ramsay does business under the name of Ramsay & Son, but in reality the business is, or at least was, at the date when the facts hereinafter mentioned took place, that of Alexander Ramsay alone.

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The Consolidated Plate Glass Company, which has been sued in this action, is a body politic and corporate, which has its head office in Toronto, but carries on a large business in Montreal, where they have also an office. Alexander Ramsay, who is one of the vice-presidents of that company, is the manager of their Montreal branch, and their place of business is under the same roof as that kept by Ramsay & Son at the corner of St Paul and Inspector streets.

As the business carried on by Ramsay & Son, duplicated by that of the Consolidated Plate Glass Company, is a very extensive one, the plate glass department has been more especially entrusted to the care and management of Ramsay, junior.

In the spring of the year 1902 the following hands, among others, were in their employ, viz : Moïse Fecteau, Joseph Sicard, F. X. Beaucage and Amédée Léonard, the present plaintiff. The occupation of these men was to put up plate glasses in stores and buildings in various parts of the city under the instructions of Ramsay, junior, and one of the rules which they were enjoined to follow was to take possession of the old plate glasses whenever they had to remove one for the purpose of putting a new one in its stead, and to bring it to the store, provided, of course, that no objection was offered by the owner of it. After it had been removed and taken to the store this old plate glass became the property of the company and formed part of its stock. But whether they brought the old plate glass or not, their duty in any event was to report to Ramsay, junior, or to the bookkeeper what had been done with the old plate glass.

I now come to the narrative of the particular facts which gave occasion to the arrest here complained of. It appears that some time in the month of April, 1902, the four men named above were sent to some store in St Catherine street east, in charge of a plate glass, which was to be put up in the place of one which had been cracked and injured by a fire, which had taken place in that store some time before. They put up the new plate glass as they had been instructed to do, but in-

stead of bringing back the old one, they carried it to a grocery store owned by one Gervais, on Logan street, where after cutting it to the proper size, it was put up in the grocery window.

No report of what had been done was made at Ramsay's store, and one of the four is now said to have suggested that if any question were put to them about what had become of the old piece of plate glass, they would say that it was too badly broken to be of any use.

It is also said that after the putting up of the old plate glass, there was some money shared among the men.

It must be observed that the putting up of this old plate glass took place in the evening after six o'clock, that is to say, after the men's regular working hours. A short time after this occurred, Leonard, the plaintiff, left Ramsay's establishment, not, however, through any trouble or misunderstanding with his employers, but of his own accord, and for the sole purpose of improving his condition. He rented a stall in the Bonsecours market and started business there as a produce merchant.

He had been in business for about twelve months, when much to his surprise, he, one evening, received the visit of his former companion, Beaucage, who was accompanied by detective Gallagher. He was then informed that a charge of theft was about to be made against Fecteau, with respect to the disposing of the old plate glass which had been put up at Gervais' store in the spring of the year previous, and that unless he told the detective all he knew about this affair, he would share the fate of Fecteau.

Leonard protested that he was innocent, and protested that he knew nothing wrong about what had been done on that occasion. A day or two later he was arrested, along with Fecteau and Sicard, on the complaint of Alexander Francis Ramsay. It then became known that this trouble had originated in a quarrel which had sprung up between Beaucage and Fecteau, the effect of which had been the dismissal of Beaucage through the influence of the foreman. Beaucage had

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vowed he would have his revenge upon Fecteau. Hence his denunciation of the latter in connection with the removal of the old plate glass carried to Gervais' store on Logan street. Beaucage probably did not care about incriminating Leonard and Sicard, with whom he had always entertained friendly relations, but as both were connected with the affair, the two found themselves involved in the accusation brought against Fecteau by Ramsay, junior. The charge laid against the three was in the following words: "The information and complaint of Alexander F. Ramsay, manufacturer, taken upon oath this 28th day of April, 1903. . . . before Ulric Lafontaine, justice of the peace . . . who saith: I live at No 16 Inspector street. I am credibly informed and I have good reason to believe and suspect, and I do verily believe and suspect, that in said City of Montreal, about a year ago, Moise Fecteau, Amédée Leonard and Joseph Sicard did steal one pane of plate glass, valued about twenty dollars, the property of the Consolidated Plate Glass Company. Wherefore I pray for justice, and I have signed."

On this complaint being sworn to, Fecteau, Sicard and Leonard were arrested, and lodged in one of the cells at the police station, where they were kept for about an hour and a half, prior to their being let out on bail.

The preliminary investigation took place before Mathias Charles Desnoyers, esquire, judge of the sessions of the peace, on the 18th of May, 1903.

After hearing the evidence of Alexander F. Ramsay, the complainant, that of Beaucage and Gallagher, the city detective, and that of the accused themselves the latter were declared not guilty and immediately discharged. Fecteau and Sicard were at once reinstated in their former employment, at Ramsay's store, after being indemnified for their loss of time, and Leonard returned to his business in Bonsecours market.

On the 3rd of June the latter took out his present action in damages for false arrest, claiming \$5,000 damages.

As stated above the plaintiff's action is directed both against

Alexander Francis Ramsay and against the Consolidated Plate Glass Company, of which he says Alexander Francis Ramsay, the complainant, was the vice-president and the agent. Both defendants appeared jointly by the same counsel, Messrs Gilman and Boyd, and pleaded also jointly, specially denying all the plaintiff's allegations. Later on, however, on motion being made on behalf of the Consolidated Plate Glass Company, Messrs Campbell, Meredith, Macpherson & Hague were substituted as the latter's counsel to Messrs Gilman and Boyd, and during the "*enquête*" each of the above legal firms cross-examined the witnesses and produced evidence on behalf of their respective clients without however altering or modifying in any way the original plea.

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Four questions have to be looked into in this cause : 1. Were the three accused or was any one of them guilty of the charge of theft brought against them ? 2. If they were innocent was the defendant Ramsay justified or excusable in laying the charge of theft against them ; in other words, did Ramsay, junior, act with or without probable and reasonable cause ? 3. Assuming that the complaint had been lodged without any reasonable and probable cause, were Ramsay's relations with the company defendant such as would involve the latter in his fault ? 4. If the defendants are to be held responsible in damages in consequence of the arrest complained of, what must be the measure of damages allowed to the plaintiff ?

The solution of the first question cannot give rise to any lengthy discussion.

It is as clear as can be that the old plate glass never was the property of the Consolidated Plate Glass Company. The plate glass in question was the property of the owner of the house where it had originally been put up, and Ramsay, junior, the complainant, never showed that the company for which he was acting, had ever at any time, acquired any right of property in it.

The second question is : Did Ramsay act with or without probable and reasonable cause ? before charging these men with the crime of theft Ramsay, junior, should have

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made proper inquiries. He should have made sure that his men had actually taken possession of this old plate glass as salvage to be then brought to the store with the consent of the owner. If, as afterwards turned out to be the case, the piece of glass in question had already been disposed of by the owner of it, in favor of some other person, then it was clear that it had never become the property of the Consolidated Plate-Glass Company, and that the men in its employ could not be accused of having stolen it.

It appears that this old plate glass had been sold to the contractor, who had charge of making the repairs, after the fire in the store in question, and that he, in turn, had sold it to Bourgeois, who had it put up in his store on Logan street. The only participation of Fecteau and of his two companions in this affair had been to give their time and labor in taking the plate glass to Bourgeois' store, and to put it up there after their regular day's work was over. All this could easily have been found out by Ramsay, had he taken the trouble to make the proper inquiries.

Ramsay gave as his excuse that the men had made no report at the store of what had become of the salvage on that occasion.

This was, no doubt, a serious dereliction of duty and a circumstance of a nature to excite his suspicion against his men, but it was not sufficient of itself to justify a charge of theft.

The third question has reference to the responsibility of the Consolidated Plate Glass Company. Is the company to be held responsible, under the circumstances which have come to light through the evidence adduced in this case?

Hilliard, on Torts, lays down the following rule with respect to the liability of corporations for the wrongs committed by their servants or agents.

"To render a corporation liable for the wrongful acts of its officers, it must either appear that they were expressly authorized to do the act, or that it was *bona fide* done in pursuance of a general authority in relation to the subject of it, or adopted or ratified by the corporation." Further on the au-

thor says:—"Where an affirmative act is complained of the only way in which a corporation can be liable, in an action on the case, is either by their organized action through the board of direction, or for the acts of their agents, on the principle of "*respondeat superior*."

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Article 360 of our Civil Code, speaking of the officers of corporations, says: "These officers represent the corporation in all acts, contracts or suits, and bind it in all matters which do not exceed the limit of the powers conferred on them. These powers are either determined by law, by the by-laws of the corporation, or by the nature of the duties imposed."

Ramsay, junior, the defendant in this cause, was not the vice-president, nor the manager of "The Consolidated Plate Glass Company," as is wrongly alleged in the plaintiff's declaration, but his father, Alexander Ramsay, was, and the proof shows that when he swore to the complaint upon which the plaintiff was arrested he did so in obedience to the instructions he had received from his father, who, in his turn, tells us that he gave such instructions in the *bona fide* exercise of what he thought to be the execution of his duty towards the company, and whilst acting under such circumstances, I fail to see why I should discriminate between the party who actually initiated the criminal proceedings and the other defendant, the Consolidated Plate Glass Company, acting through Alexander Ramsay, its vice-president and managing director at Montreal, who, whilst acting as he thought in the discharge of his obligations towards his principals, and within the scope of his authority, caused the criminal proceedings to be so initiated.

By the terms of his engagement with the Consolidated Plate Glass Company, Alexander Ramsay, the elder, was in charge of their stock, and was bound to do all that which a prudent administrator should do to protect it. In the present instance, he may have committed an error of judgment with respect to what should have constituted the criminality of the parties against whom he laid his charge, but he was undoub-

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tedly active in the rightful performance of his duty towards his principals, and what I deem to be within the scope of his authority in endeavoring to protect or rescue the property of the company against thieves or pilferers.

On this point, I would refer the parties to the case *St Michael vs La Cité de Montréal* (1). I am therefore of opinion that the Consolidated Plate Glass Company should be held responsible jointly with the other defendant.

The fourth and last question is as to the amount of damages to be awarded. The plaintiff in his declaration states that he paid \$1.50 for his bond and that he still owes to the counsel who took charge of his defence \$50.00. This is in addition to the sum of \$25.00 which he paid him at the time of his arrest. He also claims that during the proceedings before the magistrate, he lost \$5.00 by being obliged to neglect his business and under that head he claims \$150.00. He then claims \$4,000 as representing the damage done to his reputation, to his honor and to his credit. In estimating the damages claimed, I must take into account a particular circumstances to which I have already referred and to be of a very high importance in this case. The defendants are no doubt at fault, but I consider that the plaintiff and his companions were not altogether blameless. Their duty was to report to their employers what they had done with the old plate glass. Their failure to do so was of a nature to excite suspicion in the mind of Ramsay, junior, as well as in that of his father. I have no doubt that if a proper report had been made at the store, no charge would ever have been laid.

The plaintiff has endeavored to meet this reproach by laying the fault upon Fecteau, whose duty it was to make said report in his capacity of foreman.

This answer is not satisfactory, in view of the evidence I have before me. Beaucage swears that they all agreed at

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the time not only to abstain from making any report but to make a false one if called upon at the store to answer questions about what had become of the salvage. They would say that the old plate glass was too badly broken to be of any use.

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I am of opinion therefore that, as the plaintiff has contributed by his irregular conduct in bringing about the arrest he is actually complaining of, he must also contribute in the damages which were the consequence of said arrest.

Judgment will go against both defendants jointly, and severally for the sum of \$150.00 with the interest from the dates of these presents, with costs as in an action of over \$200.00.

The Court reserves to pronounce later on, if need be, upon plaintiff's demand for coercive imprisonment.

D. A. Lafortune, K. C., for the plaintiff.

Campbell, Meredith, Macpherson & Hague, for the defendants.

COUR SUPÉRIEURE

QUÉBEC, 1er mai 1906.

Présent :—LARUE, J.

MORSE v. THE LEVIS COUNTY RAILWAY CO & LA
COMMISSION DES CHEMINS À BARRIÈRE DE
LA RIVE SUD, Oppte & THE NEW YORK
TRUST CO., Contestante.

*Privilège—Obligation de faire exécuter par le créancier au
défaut du débiteur—Coût des travaux.*

Jugé :—Une corporation tenue à l'entretien d'un chemin public qui convient par contrat avec une compagnie que celle-ci pourra construire et exploiter un tramway dans le chemin à la condition d'en faire les travaux d'entretien, n'acquiert aucun privilège sur ce tramway pour le coût de ces mêmes travaux qu'elle se voit forcée d'exécuter à raison de la déconfiture de la compagnie.

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LARUE, J. :—

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The Lévis
County Ry
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&
La Commis-
sion des
Chemins à
Barrière de
Rive Sud
&
The New
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Company.
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Le chemin de fer Lévis County Railway Company a été vendu par autorité de justice et l'opposante (La commission des chemins à barrière de la rive sud) demande par son opposition afin de conserver à être, sur le produit de la vente, payée par privilège et de préférence à tout autre créancier, de la somme de \$192.00 qui lui serait due pour travaux qu'elle a faits sur son chemin.

Pour baser sa réclamation elle s'appuie sur les faits suivants:

La défenderesse aurait construit et exploité son chemin de fer électrique sur les chemins qui sont sous le contrôle de l'opposante (depuis août 1903 jusqu'à juin 1905.)

Par acte du 6 novembre 1902, la défenderesse s'est engagée de tenir en bon état d'entretien et réparation les chemins, fossés et ponts de l'opposante, d'y faire même les grosses réparations sur le parcours des dits chemins sur lesquels était construite ou serait prolongée la dite ligne de la défenderesse.

Le 4 avril 1905, Scott a été nommé séquestre aux biens de la défenderesse et comme tel, il a administré les biens de la défenderesse, entr'autres le chemin de fer, pour le bénéfice et l'intérêt commun de toutes les parties concernées du 4 avril au 19 juin 1905.

Le 19 juin 1905, le chemin de fer a été vendu par le shérif et le séquestre relevé de sa charge.

Le séquestre ne s'est pas conformé aux obligations du contrat et n'a pas tenu les chemins en bon état de réparation, ni les fossés, malgré qu'il ait été régulièrement mis en demeure de le faire et, durant le temps du séquestre, l'opposante a dû faire ces réparations pour lesquelles elle réclame la somme ci-haut de \$192.

Ces travaux, dit l'opposante, étaient d'une absolue nécessité, pressants et urgents. C'étaient des travaux auxquels la défenderesse et son séquestre étaient tenus envers l'opposante, qui, elle-même, en était tenue par la loi et qu'il (le séquestre) était autorisé à faire et à payer en vertu d'un jugement du 22 mai 1905 et qui ont été faits dans l'intérêt commun.

Le séquestre a refusé de payer la dite opposante.

La New York Trust Co. conteste l'opposition afin de conserver de la commission des chemins à barrière.

Elle allègue qu'elle est créancière hypothécaire de la défenderesse en vertu d'un contrat passé le 4 août 1902, par lequel la compagnie défenderesse lui a hypothéqué son chemin de fer comme sûreté du paiement de ses débentures (bonds) au montant de \$250,000 ; que ces débentures ont été dûment émises par la défenderesse qui est subséquemment devenue insolvable et a fait défaut de payer l'intérêt ; que la dite contestante a obtenu jugement contre la compagnie défenderesse le 21 septembre 1905 pour la somme de \$262,500, qu'en conséquence elle a droit de réclamer ; que l'argent à distribuer \$50,000 est le produit de la vente du chemin de fer à elle hypothéqué ; et qu'en conséquence la contestante est en droit de contester l'opposition de l'opposante.

La contestante allègue en outre que l'opposante n'a pas de privilège sur et à même le produit réalisé par la vente du chemin de fer.

L'opposante, par sa réponse, admet que la vente du dit chemin de fer a réalisé \$50,000 qui ont été payées à l'acquit des porteurs de débentures, représentés par la contestante, pour lesquels porteurs de débentures le dit chemin de fer a été acheté, mais ajoute que la contestante qui représente des créanciers hypothécaires ne peut être colloquée qu'après l'opposante qui est créancière privilégiée pour les travaux mentionnés dans l'opposition, et faits pendant l'administration et l'exploitation du séquestre.

Le chemin de fer électrique de la défenderesse est construit sur le chemin de l'opposante.

En vertu du contrat passé entre l'opposante et la défenderesse le 6 novembre 1902, l'opposante, qui a été autorisée par la loi, a concédé à la défenderesse le droit de construire et exploiter son chemin de fer sur le chemin de la commission, à la charge, entr'autres obligations, de tenir en bon état d'entretien et de réparations dans toute sa largeur le chemin de la commission, ponts, ponceaux et fossés, d'y faire même les grosses ré-

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parations dues à la force majeure ou cas fortuit, et en outre de payer \$100 par mois aux porteurs de débentures de la commission.

La compagnie défenderesse est devenue insolvable et a été poursuivie par nombre de ses créanciers.

Le 23 mars 1903, le chemin de fer de la défenderesse a été saisi et comme, durant l'intervalle entre la saisie et la vente en justice, son exploitation était arrêtée au détriment de tous les intéressés—sur requête de certains créanciers, Arthur Scott a été nommé séquestre le 4 avril 1905 pour administrer la propriété saisie et en percevoir les fruits et revenus de la manière pourvue par la loi.

Scott s'est mis en possession et sous sa direction le chemin de fer de la défenderesse a été exploité, mais à perte,—(depuis le 4 avril jusqu'au 19 juin).

Dès le 8 et le 14 avril, la commission opposante ayant constaté que son chemin n'était aucunement entretenu et avait besoin de réparations urgentes, sous peine d'être exposée à des dommages, a mis M. Scott en demeure de faire ces réparations.

Scott répondit que sa courte possession ne lui permettait pas de faire les déboursés nécessaires. Il suggéra toutefois que la commission s'adressât à la cour pour obtenir permission de faire l'ouvrage comme créanciers privilégiés ou bien de faire l'ouvrage et de le charger à la compagnie.

Le 22 mai, sur requête de l'opposante, jugement est intervenu ordonnant au séquestre de payer toutes les réparations d'entretien, etc, du chemin jusqu'à concurrence de \$100 par mois, mais seulement après paiement des dépenses d'exploitation et de la force motrice.

Scott n'a rien payé, sauf peut-être quelques légères réparations à la voie du chemin de fer, c'est-à-dire tout juste ce qu'il fallait pour permettre au chemin de fer de fonctionner. La raison pour laquelle il n'a pas fait plus est évidente, puisqu'il appert de ses comptes que durant le séquestre le chemin de fer n'a pas payé ses frais d'exploitation que le compte du séques-

tre lui-même démontre une perte ou déficit de \$515.17 pour laquelle le séquestre réclame un privilège.

L'opposante a dû faire les travaux qui étaient nécessaires et urgents. Leur chiffre et leur valeur sont prouvés.

Toute la question est de déterminer si elle a un privilège pour ses travaux.

Elle prétend que ces travaux ont été faits dans l'intérêt commun, ce qui lui assure son privilège. Qu'entend-on par frais faits dans l'intérêt commun ? 3 Aubry et Rau, p. 128 :

“ On doit considérer comme tels (frais de justice) tous les “ frais faits dans l'intérêt commun des créanciers, pour la con- “ servation, la liquidation, la réalisation des biens du débiteur “ et pour la distribution du prix provenant, peu importe qu'ils “ aient été exposés à l'occasion ou dans le cours d'une instan- “ ce judiciaire, ou qu'ils soient relatifs à des actes ou opéra- “ tions extrajudiciaires.”

Baudry-Lacantinerie, No 310, (1 Priv. & Hyp.)

Notre article 2009 C. C. assimile aux frais de justice tous ceux faits dans l'intérêt commun des créanciers et qui ont eu pour objet la conservation et la liquidation des biens vendus.

C'est aussi la jurisprudence que je trouve aux arrêts cités par le procureur de l'opposante :

Sirey :— 1878-1-461

1882-1- 57

1886-1-264

1890-1-513

1893-1-365

Barnard & Molson (1).

In re Duberger, failli et divers opposants (2).

Les travaux faits par la commission des chemins à barrière ont-ils servi soit à l'exploitation, soit à la liquidation des biens immeubles de la défenderesse et qui ont été vendus par autorité de justice ?

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(1) M. L. R. 6 B. R. 291.

(2) 13 L. N. 410.

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La preuve constate à n'en pouvoir douter, que le chemin de la défenderesse n'a aucunement bénéficié de ces travaux, lesquels n'étaient pas nécessaires à son exploitation.

Leur but était de réparer le chemin de la commission pour éviter à cette dernière les responsabilités légales résultant de son contrôle.

C'était l'accomplissement de l'obligation dont, il est vrai, l'opposante s'était déchargée sur la défenderesse par son contrat du 6 novembre 1902, mais qui n'intéressait aucunement les créanciers.

Le chemin de fer électrique de la défenderesse n'ayant aucun besoin de ces travaux pour son exploitation, on ne saurait dire qu'ils ont été faits dans l'intérêt commun.

Pour cette raison il me faut rejeter cette partie de l'opposition par laquelle l'opposante demande à être colloquée par privilège.

Demers & Demers, pour l'opposante.

Pentland, Stuart & Brodie, pour la contestante.

COUR DE RÉVISION.

QUÉBEC, 31 mai 1906.

Présents :—ROUTHIER, juge en chef, LARUE & L'ANGELIER, JJ.

GUIMONT, failli v. DAMPHOUSSE ET AL, curateurs &
LA COMPAGNIE DE BRASSERIE DE
BEAUPORT, requérante.

Procédure—*Cession de biens*—*Bordereau de dividende*—
Contestation—*Ordre de préparer nouveau bordereau*.

Jugé :—Lorsque sur la contestation d'un bordereau de dividende par un créancier qui se plaint de ne pas y figurer pour le montant intégral de sa réclamation par privilège, il intervient un jugement qui la maintient et ordonne au curateur de préparer un autre bordereau, il suffit de désintéresser le créancier en le payant et dans ce cas le curateur n'est pas tenu de préparer un nouveau bordereau.

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Les curateurs en cette affaire ayant préparé un bordereau de dividende, M^{re} Bédard, avocat, en a demandé l'annulation, prétendant qu'il aurait dû y être colloqué comme créancier privilégié pour la somme de \$36.

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Les curateurs ont résisté à cette contestation, mais elle a été maintenue, et le bordereau attaqué a été annulé. Par le jugement de la cour, ordre a été donné aux curateurs d'en préparer un autre, et d'y colloquer M. Bédard pour \$36, comme créancier privilégié.

Au lieu de préparer un nouveau bordereau, les curateurs ont payé à M. Bédard ses \$36. La requérante créancière du failli, et qui n'avait pas attaqué le bordereau a demandé l'émission contre eux d'une règle pour mépris de cour, et leur emprisonnement s'ils ne le préparaient pas. Sa requête a été renvoyée par la Cour Supérieure de Trois Rivières.

Le jugement qui a annulé le bordereau et a ordonné d'en préparer un nouveau a-t-il l'autorité de la chose jugée seulement pour M. Bédard qui l'a obtenu, ou l'a-t-il pour tous les créanciers intéressés dans la faillite ? Si M. Bédard seul peut l'invoquer il est évident que la requête de la contestante est mal fondée.

Les autorités sont généralement d'accord que tous les créanciers d'un failli sont censés représentés par celui qui fait une contestation de réclamation. Si donc le jugement obtenu par M. Bédard annule complètement le bordereau, les curateurs auraient dû en faire un autre.

Mais l'annule-t-il d'une manière absolue, ou ne l'annule-t-il qu'en ce qui concerne M. Bédard ? Sans doute, il pourrait bien l'annuler, si l'on n'en prend que la première partie, mais si l'on en prend tout le texte il ne l'annule que quant à M. Bédard. J'irai même plus loin, et je dirai qu'il ne l'annule pas, mais le modifie seulement. La manière dont il s'exprime revient à dire ceci : les curateurs devront modifier le bordereau qu'ils ont préparé de manière à y faire figurer comme créancier pri-

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vilégié M. Bédard, qui n'y paraît que comme créancier simplement chirographaire.

Les curateurs ayant payé à M. Bédard la somme pour laquelle ils avaient ordre de le colloquer, ils ont fait plus que n'exigeait le jugement.

La Cour de Trois Rivières a donc eu raison de renvoyer la requête pour contrainte par corps, et je suis d'avis que son jugement doit être confirmé avec dépens.

Letellier & Bouffard, pour la requérante.
Talbot & Godbout, pour le curateur.

COURT OF REVIEW.

MONTREAL, April 28th 1906.

Present :—ARCHIBALD, ROBIDOUX & PARADIS, JJ.

SHOVELIN ET VIR v. HANSON.

Master and servant—Implied power of servant to give credit to customers—Liability of master for disbursements by servant.

Held :—10. A driver employed by a laundryman to deliver laundry to customers, is not liable for credit given them, when it is established that all the drivers in the same employ were in the habit of doing so to the knowledge of their employer.

20. The driver has the right to take credit for sums paid by him to customers for goods lost and due them by his employer.

The judgment inscribed for Review, which is reversed, was rendered in the Superior Court, PAGNUELO, J., on the 7th of June 1905 as follows :—

PAGNUELO, J. :—

La cour, après avoir entendu les parties par leurs avocats au mérite de cette cause, examiné la procédure, les pièces produites, entendu la preuve et avoir délibéré :

Attendu que les demandeurs réclament du défendeur la somme de \$203.93 représentant des montants d'argent perçus et collectés par le défendeur, à l'emploi de la demanderesse, dont il ne lui aurait rendu aucun compte, et représentant également certains montants d'argent que le défendeur aurait dû percevoir et collecter des clients de la demanderesse, pour le bénéfice de cette dernière, alors qu'il était également à son emploi, et qu'il avait des instructions positives de ne point livrer les effets sans faire, au préalable, la collection des différents items qu'il était chargé de percevoir et collecter ;

Attendu que le défendeur nie spécialement les allégués de la déclaration et sa responsabilité ;

Considérant que le défendeur était responsable des crédits qu'il a faits de lui-même aux clients qui devaient payer sur délivrance des effets, et que, de ce chef, il est reliquataire de la somme de \$185.94 envers la demanderesse ;

Considérant que le défendeur n'a aucun droit de se faire rembourser les sommes qu'il aurait payées volontairement aux clients pour objets perdus ou endommagés, lorsque la demanderesse avait refusé de les payer, et qu'en outre il n'a pas été fait une preuve satisfaisante de ces paiements allégués :

Condamne le dit défendeur à payer à la dite demanderesse la susdite somme de \$185.94 avec intérêt à compter du 15 septembre 1904, date de l'assignation, et les dépens.

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JUDGMENT IN REVIEW.

The Court, having heard the parties by their respective counsel, upon the demand of defendant for revision of the judgment rendered in the Superior Court, in and for the district of Montreal, on the seventh day of June one thousand nine hundred and five ; having examined the record and proceedings had in this cause, and maturely deliberated :

Seeing the plaintiff sues the defendant for the recovery of \$203.93 for amounts of money collected by the latter and of which he had not rendered an account and of amounts of money which he ought to have collected and did not collect ;

Seeing the defendant was employed as a driver in the bu-

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siness of the plaintiff who conducted a laundry and had given credit to customers of said laundry from time to time and the judgment of the Court below finds that this credit amounted to the sum of \$185.94, which the defendant was condemned to pay to the plaintiff ;

Considering that the defendant contends that the custom of the plaintiff's laundry was that the drivers should give credit to the customers, and that indeed the plaintiff's business could not be successfully conducted in the face of the competition which exists in the City of Montreal without giving such credit ;

Considering that all the drivers of the plaintiff did give such credit to the knowledge of the plaintiff and without any objection on her part ;

Considering moreover that it is proved that the defendant, acting in the interest of the plaintiff and for the purpose of keeping the plaintiff's business, did settle in cash various sums for lost goods which the plaintiff owed to various customers ;

Considering that the plaintiff has wholly failed to prove that the defendant did not reimburse to her all the moneys which he actually received for the plaintiff during the time when he was employed as her driver ;

Considering that the plaintiff has not proved what efforts, if any, were made to recover from customers the several credits which the defendant gave in the course of business ;

Considering that on the whole, the plaintiff's action is unfounded and not proved ;

Considering that there is error in the judgment of the Superior Court, maintaining the plaintiff's action :

Doth reverse the judgment of the Superior Court and proceeding to render the judgment which the said Superior Court ought to have rendered :

Doth dismiss the plaintiff's action with costs, including the costs of Review, and doth order that the record in this case be transmitted to the Court of first instance.

W. Mercier, K. C., for the plaintiffs.

Monty & Duranleau, for the defendant.

SUPERIOR COURT.

MONTREAL, July 9th 1906.

Coram :—TASCHEREAU, J.

CHARLES C. BROWNE, Petitioner for Habeas
Corpus v. THE UNITED STATES OF
AMERICA, Demanding extradition.

Habeas Corpus—Marking writ—Extradition—Evidence in support of charge—Exparte affidavits—Judicial discretion of commission for extradition—Extraditable offence—Fraud by an agent.

HELD :—10. The omission to mark a writ of *Habeas Corpus* in the manner prescribed in sect. 3, chap. 95, C. S. L. C., is not a ground of objection that can be taken by the party prosecuting the prisoner or opposing his discharge, more particularly after the merits of the cause of detention have been inquired into. The formality is one required for the instruction of the sheriff, gaoler or officer detaining the prisoner.

20. Affidavits taken *exparte* in the manner provided in section 10 of the Extradition Act R. S. C., cap. CXLII are admissible as evidence in support of the charge for which the extradition of a fugitive is sought.

30. The sufficiency of such evidence is a matter for the judicial discretion of the extradition commissioner and his decision thereon is not subject to review in *Habeas Corpus* proceedings.

40. The expression "fraud by an agent" in § 4 of article 1 of the Extradition Treaty between Great Britain and the United States (Convention of 1889-90) is not confined to agents who misapply trust moneys, but is of general purport and extends to servants or employees of the Government, such as appraisers of imported goods subject to customs' duties.

TASCHEREAU, J. :—

The petitioner is before me on a writ of *Habeas Corpus*, issued at his request, to quash and set aside, as illegal and void, the warrant of committal of the Extradition Commissioner, Mr Choquet, dated the 14th June 1906. The writ was issued in virtue of sections 12 and 16 of the Revised Statutes of Canada, which allow a fugitive offender to apply

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for it, to test the validity of the warrant of surrender, under which he is held for extradition.

The arrest of the petitioner took place on the 15th May 1906, upon the information and complaint of Mr William Wickam Smith, special assistant to the attorney general of the United States, and the duly authorized agent of the Government of the United States. There are four separate counts in the document, which contain allegations similar in substance, referring to different offences committed at different dates, the first count being as follows :—

“ That at the City of New York, in the State of New York, Charles C. Browne, late of the said state, was an officer of the revenue of the said United States and an agent of the said United States, to wit, an examiner of merchandise at the Port of New York, and that, as such, it was then and there the duty of the said Charles C. Browne, as such examiner, to carefully examine, inspect and appraise and also to ascertain the quantities of (any invoice or affidavit thereto to the contrary notwithstanding) all such goods, wares and merchandise imported into the said Port of New York from foreign countries as the collector of customs of the said United States at the said port, or his deputy, should designate and send to the public stores of the said port for that purpose, and as should in consequence thereof, come before and into the hands of him, the said Charles C. Browne, as such examiner, and to aid the said United States Appraisers at that port in so doing ; and it was also then and there the duty of the said Charles C. Browne, as such examiner, to use his best endeavours to prevent and detect frauds against the laws of the said United States imposing duties upon imports.”

“ That on or about the 13th day of April, in the year of Our Lord, one thousand nine hundred and one the partnership firm of A. S. Rosenthal & Company, then doing business at the City of New York and composed of one Abraham S. Rosenthal and one Martin L. Cohn, imported into the said United States at the said Port of New York from a foreign country, to wit, Japan, a certain large quantity

“ of dutiable goods, wares and merchandise, namely seven
 “ cases or packages of silk and cotton piece goods, and did
 “ make a written estimated entry for immediate consumption
 “ thereof with the collector, which entry was upon a consular
 “ invoice which the said Rosenthal and Cohn then and there
 “ produced to the said collector ; that in said invoice the
 “ weight of the goods and the percentage of silk contained
 “ therein were falsely stated ; that one of the cases was de-
 “ signed on the invoice by the collector, or his deputy, and
 “ ordered to the public stores at the said Port of New York for
 “ examination, and was there put into the hands of the said
 “ Charles C. Browne, examiner, as aforesaid, for examination
 “ and report and that the said Browne, whose duty it was to
 “ report faithfully and correctly the weight and the percen-
 “ tage of silk in the said goods, together with a true descrip-
 “ tion of the said goods, wares and merchandise, to the said
 “ collector, unlawfully, wilfully and knowingly did neglect
 “ and refuse to perform his duty as such examiner in the pre-
 “ mises, and did make upon the said invoice a false and frau-
 “ dulent description of the said merchandise so contained in
 “ the said case, and unlawfully, wilfully, and knowingly
 “ made upon the said invoice a false and fraudulent description
 “ of the said merchandise, in that he reported the description,
 “ weight and percentage of silk as stated upon the invoice to
 “ be correct, so that the said estimated entry was consequent-
 “ ly liquidated by the said collector as correct and less than
 “ the amount of duty legally payable thereon, was collected
 “ by the said collector, and, owing to the said neglect and the
 “ wilful, unlawful and knowingly false report, the said Uni-
 “ ted States of America were defrauded of the amount of duty
 “ properly payable upon the said entry, and the said Char-
 “ les C. Browne did then and there well know that the said
 “ invoice contained a false statement of weight and did well
 “ know the said statement to be false, and the said Charles
 “ C. Browne on the 26th of April, in the year of Our Lord, one
 “ thousand nine hundred and one, at the City of New York in
 “ the said Southern District of New York in manner and

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" form and by the means aforesaid did commit the offence of fraud and did unlawfully and knowingly aid in admitting to entry certain goods, wares and merchandise upon payment of less than the amount of duty legally due thereon : against the peace and dignity of the said United States and contrary to the form of the statute in such case made and provided."

The second count alleges a similar offence committed on the 26th February 1901, as to 37 cases ; the third count, another offence committed on the 1st June 1901, as to 7 cases ; and the fourth count, another offence committed on the 24th May 1901, as to 8 cases. The Extradition Commissioner ordered the surrender of Browne on all the grounds of accusation contained in the four counts.

The evidence adduced by the demanding power, the United States Government, consists of five depositions or affidavits taken in New York and of the oral testimony, heard before the commissioner, of W. W. Smith and of B. B. Bonheim U. S. examiner and analyst. The five affidavits are those of Wilbur F. Wakeman, appraiser, Rudolph Streuli, chief of the bureau of analysts of textile fabrics, William L. Ludhum, clerk in the appraisers' department, Frank A. Towarby, also a clerk in the same department and of John J. Nikola, clerk in the liquidating division, all custom house officers of the demanding power.

I will first dispose of an objection taken by the United States counsel as to the validity of the writ of *Habeas Corpus* issued in this case. No mention was made before me, at the oral argument, of the point involved and I find it raised for the first time in the written memorandum submitted to me by the learned counsel. The objection is that the writ is not signed by the judge who ordered the issue, and is not marked. "By virtue of chapter 95 of the consolidated statutes for Lower Canada" as provided by section 3 of the *Habeas Corpus* Act. Such an objection cannot be raised now. The writ was not objected to when duly returned, its form was accepted as sufficient, the prisoner was brought before me, and both he and

the demanding power, by their respective counsel, discussed the *merits* of the case. But independently of this, I do not think the objection serious. Section 3, relied upon, contains the motive or reason of the enactment : "And that no sheriff, " gaoler or other officer may pretend ignorance of the import " of any such writ, all such writs shall be, etc, etc." The prisoner once brought before the judge, and the detaining officer having obeyed the writ, in its form, the demand for *Habeas Corpus* must be proceeded with upon its merits.

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Let us now turn to the validity of the order of surrender.

The first ground urged against it by the petitioner is that the affidavits produced by the United States were inadmissible as evidence and should not have been received. These affidavits were signed and sworn to in New York on the 21st May (the information and complaint having been filed on the 15th May). The contention of the petitioner is that under section ten of the Extradition Act, depositions or statements under oath taken in the foreign state, in support of the charge made before the foreign tribunal, when the accused was present or represented, may be produced as evidence before the Extradition Commissioner, but that it is not competent for the demanding state to produce as evidence *ex parte* affidavits obtained in the absence of the accused, and after proceedings in extradition have commenced. The petitioner adds that if such a procedure were allowed, it would render negatory the provisions of section nine, which obliges the Commissioner to hear the case in the same manner as if the fugitive was brought before him on a preliminary inquiry ; that the regular way to procure the evidence which was obtained by means of these affidavits would have been to issue a commission under article 683 of the Criminal Code, which provides for such cases.

Sections nine, ten and eleven of the Extradition Act must be read together. Section nine enacts "that the fugitive shall " be brought before a judge who shall, *subject to the provisions of this act*, hear the case in the same manner, as nearly " as may be, as if the fugitive was brought before a justice

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" of the peace, charged with an indictable offence committed in Canada." Section ten (1st sub-section) is as follows : "Depositions or statements taken in a foreign state on oath, or on affirmation, when affirmation is allowed by the law of the state, and copies of such depositions or statements, and foreign certificates of, or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this act."

And section eleven has this provision : "In the case of a fugitive accused of an extradition crime, such evidence is produced as would, according to the law of Canada, *subject to the provisions of this act*, justify his committal for trial."

Summarily, these sections assimilate the inquiry in extradition matters to preliminary inquiries by justices of the peace subject to the special provisions of the extradition act. Now, section ten must certainly contain a special provision, not to be found in the law respecting preliminary inquiries, allowing the production of depositions or statements taken in the foreign state when properly taken and authenticated. No distinction is made between *ex parte* affidavits and depositions taken in presence of the accused, or between such documents obtained before or after the beginning of the proceedings in extradition. They are all allowed *without exception*. And how can we exclude a certain class of affidavits, when the provision of the law is clear and general ? — Article 683 of the criminal code is only applicable to commissions issued for the purposes of a criminal *trial* in Canada. In matters of extradition, where proceedings are expected to be expeditious and short, if not summary, an order for a commission would appear strange and unreasonable and the law of extradition, far from allowing an order of that kind, introduces a special system which precludes its very idea. Besides, the inquiry by the extradition commission is not a *trial* and requires only *prima facie* evidence.

Our whole jurisprudence is on the side of this interpretation and is favorable to the admission of *ex parte* affidavits in extradition proceedings. Under Statute 31 Vict., ch. 94, being the

first Extradition Act of Canada, it was competent to produce only affidavits upon which the foreign warrant was based. See, under that statute, the opinion of Mr Justice Gwynne (6 Ont. Practice Rep. p. 236). The restriction was removed by subsequent legislation, *all affidavits were allowed*, and section nine of the second Extradition Act, 40 Vict., ch. 25, is almost identical in terms with section ten of the present act. See, under 40 Vict., ch. 25, the *Phelan* case ⁽¹⁾ and the *Hoke* case ⁽²⁾. Finally, under the present act, see the case of *Narska* ⁽³⁾ and the case of *Feinberg* ⁽⁴⁾.

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The affidavits or depositions in this case being otherwise regular, duly attested and authenticated, I must dismiss as unfounded this first objection of the petitioner, and declare that the said affidavits had been duly and properly received in evidence by the Extradition Commissioner.

The second ground relied upon by the petitioner is that evidence was offered and received, with a reservation of the petitioner's objection, that a bill had been found in the State of New York against the petitioner, and that certain demurrers and objections thereto taken by the petitioner had been overruled. A bill of indictment is hearsay and not admissible, and evidence of that kind could not avail the demanding power, but the order of surrender is not based thereon, and the United States do not now rely upon that branch of their case. So, this bill of indictment must not now be taken into consideration.

The petitioner's third objection is that there is no evidence of the commission of the crime charged against him : *a* if the affidavits are excluded ; *b* even if they are allowed.

Having held that the affidavits were properly accepted, I have to consider the whole evidence, whether by affidavits or by oral testimony.

(1) 6 L. N. 261.

(2) 14 R. L. 704 & 15 R. L. 92.

(3) 7 Ont. W. R. 97 & 103.

(4) 4 Can. Cr. C. 270.

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Now, in matters of extradition, well and universally recognized rules can be safely laid down as follows :—Evidence to justify commitment, and not conviction, is sufficient, and it is not necessary that it should amount to proof of the guilt and be sufficient on trial to sustain the charge. The evidence to justify the holding of an accused for trial is only such as amounts to probable cause to believe him guilty. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged.

These rules trace the duty of the Extradition Commissioner under section ten of the act.

They also indicate what is the function of the Court or judge on *Habeas Corpus*. MOORE, 520, 521, 522, a well known author on Canadian criminal law has put it thus : "The question whether there is sufficient evidence to support the charge is a question for the Commissioner, and whether there is, any evidence is a question of law for the judge." See *Hawley Extradition*, p. 37 : " A reviewing Court will revise the commissioner's decision so far as to see whether there was legal and competent evidence tending to prove the commission of the crime, but it will not review the commissioner's decision as to its sufficiency."

Acting under these rules, I doubt very much whether I could interfere with the discretion exercised by the Commissioner in deciding that the *prima facie* evidence warranted, in this case, the order for surrender. He was clearly within his jurisdiction in so deciding. If the evidence brought before him appears to me conformable to the rules of law, is not my own power of appreciation, under *Habeas Corpus*, fully exhausted ?

However, I shall briefly examine the salient points of the evidence, and satisfy myself as to the sufficiency, in fact as well as in law, of the *prima facie* evidence adduced here.

The affidavits and the oral testimony disclose the following facts :—

Browne had been, for seven or eight years, an examiner of goods at the Port of New York. One of the special lines of wares and merchandise which he was called upon to examine was a class of goods named *Kaiki*, imported from Japan and composed of cotton and silk. His duty, in examining these goods, was to ascertain the relative percentage of silk and cotton contained in each piece, as the amount of duty to be paid thereon increased *pro ratu* of the percentage of silk, and the proper amount had to be imposed and collected by the liquidating department of the customer, to which his report was forwarded.

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There was also an Analytic Bureau having, as chief, Mr Rudolph Streuli. Browne's duty was to apply to Streuli for an analysis of the silk, when necessary.

In all the cases investigated here, Browne made these applications (in writing) and Streuli furnished him with written returns. In none of these sales did Browne follow the instructions or give effect to the informations of Streuli, but he returned the goods to the liquidating department as containing a percentage of silk less than that found by the public analyst ; that is, he certified as correct the percentage shown on the invoices, instead of that shown and certified by Streuli, defrauding thereby the Government of the United States of large sums of money (several hundred dollars) properly due to it, as the goods entered the United States without paying the proper amount of duty, in consequence of Browne's false returns and valuations. As a matter of fact, over ninety per cent of the goods contained over forty-five per cent of silk whereas over ninety-seven per cent were returned by Browne as containing less than forty-five per cent. The certificates and returns made by Browne are proved beyond question, his handwriting and signature are established as genuine, and the true percentage of silk, as compared with Browne's returns, is most satisfactorily evidenced.

It has been argued, on the part of the petitioner, that Bonheim's deposition contains illegal evidence. Bonheim was detailed to New York to examine the goods, after Browne had

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been transferred from his position of examiner to another service on the docks. Bonheim found, in a room of the office formerly occupied by Browne, the samples of silk used by Browne in his operations. They were found in a closet, compared with the prices of silk from which they had been taken and made the subject of Bonheim's own report on the matter.

Tickets bearing Browne's signatures were attached to these samples. I see nothing illegal in evidence of that nature. Taken separately it may be only circumstantial, but taken in connection with other facts, it may become and has really become quite conclusive.

On the whole, I have no hesitation in stating that acting myself as Commissioner, I would have ordered Browne to be surrendered, upon the more than *prima facie* evidence given before Mr Choquet.

As a fourth point, the petitioner has submitted that the offence for which he was committed is not a criminal offence under the laws of the United States.

If we believe Mr Kalisch, legal expert examined on the part of the petitioner, there are no common law offences in the United States, the federal criminal law is all contained in the several statutes. And Mr Smith, the United States expert, asked to specify the statute under which Browne could be tried, quotes section 5444 of the Revised Statutes of the United States, which reads as follows : "5444.—Every officer of " the revenue who, by any means whatever, knowingly admits " or aids in admitting to entry any goods, wares or merchand- " se, upon payment of less than the amount of duty legally " due thereon, shall be removed from office, and shall be " fined not more than five thousand dollars, or be imprison- " ed not more than two years."

Now, says the petitioner, I had no function in regard to the *entry* of goods. The pieces of mixed silk and cotton were not handed to me until after the *entry* at the custom house had been completed and samples forwarded to the appraisers' department for valuation. There are three distinct operation safter the importation of goods. They are: 1o entered ;

20 appraised ; 30 liquidated (sections 2785 to 2789, R. S. of U. S.). I had nothing to do with the *entry* of the goods, my duties commenced after that operation, and whatever I may have done as examiner cannot be held an offence against section 5444.

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True it is that the importer's first step is called his *entry*. He presents an invoice, to which he swears and an *estimated duty* is thereupon fixed upon the invoice, and paid. Then the invoice is sent to the appraisers' office whence it goes to the division that examines this particular class of goods. After examination of weight, value, etc., and after classification, and signature by the appraiser, the invoice is sent to the liquidators, who, ignoring entirely the estimated duty, figure the duty based upon the return of the appraiser (or examiner) and they compare the amount paid on estimate with the amount arrived at. If the amount arrived at is larger than the estimated amount, the importer is called upon to pay the difference, or he is paid the difference in the contrary case. Ten per cent of each class of goods on the invoice must be sent to the appraisers. The rest is given to the importer who has paid the estimated duty, under a bond which requires him to be prepared to deliver these goods, at any time within the delay for which the bond is made to the appraiser, if desired. The bond is double the value of the goods.

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It is clear to me that the word *entry* used in section 5444 does not mean the initial step of the importer, which is his own act, and with which officers of the custom have nothing to do, for which, consequently, they cannot be held responsible. The word *entry*, having relation to *Revenue Laws*, means the entire transaction by which the importer obtains the entrance of his goods into the body of the United States including the liquidation and payment of duties. Until the entire transaction between him and the government is closed, the *entry* of the goods is not regarded as completed *United States v. Baker* (1) AM. & ENGL. ENCYCL. OF LAW, 2nd Ed. Vol.

(1) 5 Ben (U. S.) 25

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11, p. 45. See also same Encycl. Vol. 24, p. 899 : "*Entry* defined. The term *entry* as used in the custom laws may mean either the written bill of entry which the importer is required to deliver to the proper officer, or, *the series of acts required to be performed in entering the goods.*"

The various cases cited by counsel for petitioner in this connection do not bear upon the interpretation of section 5444. They have reference to questions arising between the importer and the government, and do not affect the liability of the officers of the revenue towards the government.

So I consider that section 5444 is directed against all officers of revenue who may be guilty of fraud during the entire transaction (including appraisal and liquidation) of the entry of goods. Otherwise the enactment would be absurd and without effect. I consequently hold that Browne's case falls within the scope of the offence punished by that section.

The fifth and last objection of the petitioner is that the offence of which Browne is accused and for which he was committed is not covered by the Extradition Treaty.

According to the contention of the demanding power, it would be covered by paragraph four of Art. 1 of the treaty (the convention of 1889-1890) which includes, in the enumeration of crimes subject to extradition :

"Fraud by a bailee, banker, *agent*, factor, trustee or director or member or officer of any company, made criminal by the laws of both countries."

Petitioner says in substance : Fraud committed in Canada is indictable both at common law and under the Criminal Code. In the United States, it is punishable, in virtue of a statute. The statute invoked against me, Section 5444, punishes fraud committed by an officer of the revenue. But the treaty contemplates fraud on the part of persons who are entrusted with money or property to be held, or stored, or used, or invested or disposed of for the benefit of some principal, or client or customer; that class of persons does not comprise a public servant or employee, who cannot properly be styled an *agent*. Furthermore the word *agent*, as employed in

the treaty, must be construed in the light of the words with which it is associated, viz : *bailee, banker, factor, trustee or member or officer* of a company. An ordinary agent, or a public employee, not entrusted with money or property (such as an *appraiser*), cannot be said to be one of the persons enumerated in the section.

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I cannot adopt a distinction which the treaty does not make. First, it cannot be denied that a revenue officer is an *agent* of the government employing him ; so Browne was an *agent*. Secondly, the treaty does not limit its provisions to fraud committed by persons entrusted with or having the disposal of money, valuables or property. *Any fraud* committed by the persons enumerated (among whom *agents*) and made criminal by the laws of both countries, is within the reach of the clause. In the treaty the word *fraud* is issued as a generic term, embracing every possible form of that offence. Fraud, in general, consists of some deceitful practice or wilful device resorted to with intent to deprive another of his right, or in some manner to do him an injury (BLACK, *Law Dict.*). And the species of fraud now under consideration is that committed by an *agent* or *trustee*, which can be defined in law, any deceitful practice or wilful device, resorted to by the *agent* or *trustee* in the conduct of his *agency* or *trust*, with intent to deprive his *employer* or beneficiary of his right, or with intent in some manner to do him an injury (*Idem*). The above elements occur in Browne's case, his fraud is made criminal by the laws of both countries, and so his offence is covered by the Extradition Treaty.

It has been urged, on the part of the petitioner, that section 5444 of the U. S. revised statutes, says nothing of an *offence*. Surely, an article of law punishing a certain act by removal from office and by a maximum fine of five thousand dollars or a maximum imprisonment of two years, if it does not *create* an offence, does effectually punish an act made criminal in every civilised country, and which it was quite superfluous to declare criminal in the punishment clause.

On the whole, I find that the proceedings and the commit-

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tal of the fugitive Browne for surrender to the United States of America were regular and legal. The writ of *Habeas Corpus* is therefore quashed, and the prisoner is ordered to be remanded for surrender or until he may be discharged according to law.

MacMaster, Hickson & Campbell, for the United States.
McGibbon, Casgrain, Mitchell & Surveyer, for Browne.

COUR DE RÉVISION.

QUÉBEC, 31 Octobre 1906.

Présents :—LANGELIER, juge en chef suppléant, LEMIEUX
 ET SIR C. A. P. PELLETIER, JJ.

DESBIENS v. LA CORPORATION DU VILLAGE DE JONQUIÈRES.

Servitudes—Écoulement des eaux—Corporation municipale—Système d'égouttement des chemins—Action négatoire.

Juré :—Une corporation municipale ne peut pas faciliter par le système d'égouttement de ses chemins, l'écoulement des eaux, eaux sales, etc, des fonds supérieurs sur les fonds inférieurs riverains. Le recours de l'action négatoire est ouvert en faveur des propriétaires de ces derniers, pour faire cesser l'aggravation de servitude qui leur est ainsi causée.

LANGELIER, A. J. en ch. *dissentiente*.

LANGELIER, A. J. C. :—

Le demandeur a intenté contre la défenderesse une action négatoire, prétendant qu'elle exerçait illégalement une servitude sur son terrain, ou avait aggravé la servitude naturelle à laquelle il est assujetti. Il prétend que, par des travaux

faits dans le chemin sous son contrôle qui passe en face de la propriété du demandeur, elle y a fait couler une quantité d'eau plus grande que celle qui y aurait coulé, et qu'elle y a amené des eaux sales qui jettent une odeur infecte.

La défenderesse a plaidé que l'eau qui coule chez le demandeur y allait naturellement, parce que son terrain est plus bas que les terrains d'où elle vient, que s'il y a été jeté des saletés, ce n'est pas par elle, et que le demandeur doit s'en prendre à ceux qui les ont jetées.

Le tribunal de première instance a donné gain de cause au demandeur, et condamné la défenderesse à faire cesser l'état de choses dont il se plaint.

La preuve établit clairement que le terrain du défendeur est dans la partie la plus basse du village, et que toutes les eaux de la partie plus haute y coulent naturellement. La rue principale est au fond de ce qu'on appelle une "coulée." Les eaux des terrains situés le long de cette coulée s'y en vont naturellement, et, rendues au fond de la coulée, descendent sur le terrain du demandeur, pour, de là aller se jeter dans la rivière aux Sables.

Le demandeur admet tout cela, mais il se plaint que si la défenderesse n'avait pas fait les fossés qu'il y a de chaque côté du chemin, l'eau serait, sans doute, allée sur son terrain, mais en moins grande quantité, parce que, suivant l'expression de ses témoins, elle serait "morte" sur place, c'est-à-dire aurait été absorbée dans le sol.

On avouera qu'il n'y a pas dans ce fait un grief bien sérieux.

Mais, s'il existe, la défenderesse en est-elle responsable ? Le village de Jonquières étant régi par le code municipal, chacun des riverains des rues est obligé de faire et d'entretenir la rue en face de son terrain, parce que ces rues sont considérées comme des chemins de front (C. M. art. 765). Si donc quelques riverains de la rue au bas de laquelle se trouve l'immeuble du demandeur ont fait des travaux qui augmentent la servitude naturelle à laquelle est assujetti cet immeuble comme fonds inférieur, il doit s'en prendre à eux, et non pas à la corporation municipale.

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Le demandeur se plaint aussi que l'on envoie dans les fossés du chemin des eaux sales. On peut faire à cette plainte la même réponse qu'à celle dont je viens de parler : que le demandeur s'en prenne à ceux qui envoient dans les fossés de la rue ces eaux sales.

Même si c'était la corporation qui aurait fait les fossés dont se plaint le demandeur, il n'aurait aucun recours contre elle, car l'article 771 du code municipal oblige les corporations municipales à faire ou à faire faire, suivant qu'un chemin est à la charge de la corporation ou des contribuables, un fossé de chaque côté, si cela est nécessaire, pour le drainage du chemin.

Je suis donc d'avis que le jugement qui nous est déferé est erroné et qu'il doit être renversé avec dépens dans les deux cours contre le demandeur.

LEMIEUX, J. : —

La cour de première instance a maintenu l'action négatoire de Desbiens par laquelle il demandait à ce qu'il fut déclaré que son terrain n'était pas tenu de recevoir les eaux qui y étaient déversées par les fossés des chemins appartenant à la corporation défenderesse et étant sous son contrôle.

Il s'agit en cette cause de faire l'application de l'art. 501 C. C. Les faits prouvés peuvent se résumer comme suit :

Desbiens est propriétaire dans le village de Jonquières d'un emplacement situé à l'ouest de la rue principale, dont il est le riverain. De là l'action négatoire pour faire cesser cette aggravation de servitude.

La corporation prétend que son chemin ne déverse, sur la propriété de Desbiens, que les eaux naturelles qui proviennent de ce chemin, et que si une plus grande quantité d'eau ou des eaux sales et pestilentielles passent par son chemin et se déversent sur la propriété de Desbiens, ces eaux viennent des fonds adjacents à ce chemin ou en arrière de ce chemin, et qu'elle n'en est pas responsable ; que si Desbiens a un recours, il doit l'exercer contre les propriétaires de ces fonds.

Pour résoudre ce litige, il nous faut rappeler la loi qui se

rapporte aux servitudes ainsi que la loi municipale qui régit la corporation défenderesse et la loi civile.

La corporation n'est pas sérieuse ni sincère lorsqu'elle affirme qu'il ne coule pas de son chemin sur le terrain de Desbiens plus d'eau que celle qui en découle naturellement.

Le chemin de la corporation par rapport à Desbiens est un fonds supérieur, et Desbiens est prêt, et la loi lui en fait une obligation, à recevoir toutes les eaux provenant du chemin qui s'infiltrant à travers les terres ou qui à leur surface s'écoulent naturellement sur le fonds inférieur de Desbiens (501 C. C.). Or, ce ne sont pas seulement ces eaux qui se répandent sur la propriété de Desbiens, mais encore celles qui coulent dans les fossés de chaque côté du chemin. Et ces fossés ne recueillent pas seulement les eaux naturelles du chemin, mais encore celles des terrains adjacents au chemin sur un parcours de trois arpents, terrains qui, il y a quelques années, étaient égouttés par des saignées maintenant bouchées entraînaient les eaux vers la rivière aux Vases. Les fossés reçoivent de plus les eaux naturelles et aussi les eaux ménagères, des égouts, des étables et des latrines de trente-neuf emplacements échelonnés le long d'un ruisseau pratiqué par la main de l'homme à l'est du chemin. Enfin, les fossés du chemin recueillent les eaux d'une rue qui aboutit au chemin. Tous les fossés du chemin et le ruisseau en arrière ont été creusés par la main de l'homme. On conçoit aisément que tous ces moyens artificiels d'attirer les eaux dans les fossés du chemin en augmentent le volume et en facilitent l'écoulement. Les travaux étaient illégaux en ce qu'ils imprimaient aux eaux un courant plus rapide qu'ils réunissaient sur un seul point des eaux qui se seraient autrement répandues sur toute la surface du sol. 11, Démolombe, No 36.

Si ces fossés et ruisseau ne favorisaient pas l'écoulement plus rapide des eaux et ne les réunissaient pas, pourquoi les avoir faits ?

Ils ont été faits pour égoutter les trente-neuf emplacements au sud du chemin, et recevoir les égouts de leurs étables et latrines et aussi pour égoutter la ruelle communiquant avec la rue

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principale et enfin pour égoutter la rue principale et les terrains riverains.

Nous ajouterons que tous ces terrains ou emplacements au nombre de trente-neuf, n'étaient pas propres et utilisés pour la culture, qui, suivant Pardessus, est l'état naturel des fonds et ne pouvaient pas être égouttés, tel qu'on le permet pour les terrains en culture. D'ailleurs ce n'était pas un égout des terrains que l'on faisait, lorsqu'on y jetait des eaux sales de réservoir ou de ménage.

La preuve sous ce rapport nous paraît indiscutable.

Or, toutes ces eaux se dirigeaient par les fossés du chemin vis-à-vis la propriété du demandeur Desbiens, lequel terrain de l'autre côté du chemin, à cet endroit, forme une espèce de coulée. Là elles restaient stationnaires vu qu'elles n'avaient pas d'issue. Pour remédier à cet état de choses quelques contribuables de ce voisinage creusèrent à travers le chemin une rigole pour y faire traverser les eaux. A ce sujet, il est intéressant de laisser parler le témoin Lessard qui a pratiqué cette rigole.

“ Connaissez-vous la *culvert* qui existe à cet endroit ?

Oui, c'est moi qui l'ai faite.

A quoi sert la *culvert* dont vous venez de parler, vis-à-vis la propriété du demandeur, et pourquoi l'avez-vous construite ?

Par rapport que l'eau inondait. La *culvert* était trop petite, et on en a construit une autre, parce que cela faisait des dommages à notre propriété au sud-est.

La *culvert* a été construite il y a cinq ou six ans.

Qu'est-ce qui arrivait au printemps et l'été sur votre terrain au sud-est du chemin et sur les terrains avoisinants, avant que la *culvert* fut construite ?

Il y avait de l'eau qui arrivait en grande quantité sur mon terrain et qui me baignait.

Aujourd'hui la *culvert* est assez grande pour clairer l'eau de ces emplacements-là.”

Ainsi, d'après ce témoin corroboré par tous les témoins, les eaux accumulées au sud-est du chemin et qui n'avaient pas de débouché, ou qui y disparaissaient par l'évaporation ou l'in-

filtration dans les terres et qui y croupissaient en grande partie, maintenant s'écoulent seulement à travers le chemin et sont toutes déversées sur la propriété du demandeur. L'augmentation des eaux coulant sur la propriété Desbiens, qui est inférieur au chemin et aux terrains au sud-est du chemin, est telle que la rigole à travers du chemin, qui n'était que de un pied, a été creusé à deux pieds et demi, pour pouvoir laisser couler les eaux. Et le demandeur qui, pour égoutter son terrain, n'avait besoin que d'un fossé de un pied a été obligé d'en creuser un de deux pieds et demi; lequel n'est pas encore suffisant pour contenir les eaux.

Cet état de choses comporte l'aggravation, la plus formelle d'une servitude. Les eaux déversées chez le demandeur n'y viennent pas naturellement, et leur cours en a été facilité et est devenu plus rapide par la main de l'homme et par des canaux artificiels.

La corporation prétend qu'elle n'est pas tenue en loi de forcer les propriétaires des trente-neuf emplacements à ne pas se servir du ruisseau en question comme égout se déversant dans son chemin.

Cette prétention est illégale, car la corporation a tous les droits et actions civils pour protéger leur propriété et leur chemin contre les empiètements et les envahissements, et pour faire cesser les troubles apportés dans la jouissance de ce chemin et propriété. De ce chef, elle a droit d'exercer les actions en revendication complainte, en réintégrande et en bornage.

Or, les chemins doivent être traités vis-à-vis des propriétaires supérieurs comme tous les fonds inférieurs de l'art. 501, et ils sont assujettis envers les terrains plus élevés à recevoir les eaux qui en découlent naturellement sans que la main de l'homme y ait contribué.

Or, dans le cas qui nous occupe, la servitude sur le chemin en question inférieur aux terrains à l'est a été aggravée par une grande quantité d'eau, d'eaux sales et de ménage, d'égouts d'étables et de latrines, qui sont transportées par un canal fait illégalement sans autorité par la main de l'homme.

Cette aggravation de servitude était un empiètement sur le

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chemin et un trouble offert à la corporation qu'elle avait droit de faire cesser. En ne le faisant pas, elle tolérait une nuisance, un embarras et un obstacle dans son chemin, c'est-à-dire un amoncellement d'eau qui était de nature à nuire et à ronger ce chemin. Tout contribuable avait, en vertu de l'art. 288 du C. C. le droit de poursuivre la corporation pour pénalité à raison de cette nuisance et aussi pour les dommages en résultant, parce que, d'après la loi municipale, les corporations doivent en tout temps tenir les chemins sans embarras ou nuisances. Et si une corporation persistait illégalement à tolérer cette nuisance, elle pourrait être contrainte par *mandamus* à la faire disparaître, car il y a lieu à telle procédure chaque fois qu'une corporation ou corps public omet, néglige ou refuse d'accomplir un devoir que la loi lui impose.

Je crois avoir disposé de la raison de la corporation qu'elle n'était pas tenue de faire cesser le trouble qui lui était causé par les propriétaires au sud-est du chemin et qu'elle n'était pas obligée de faire disparaître la nuisance faite au chemin par les accumulations d'eau.

Mais que la corporation soit tenue ou non de faire cesser le trouble et d'enlever les embarras et obstacles sur ses chemins, ceci importe guère à Desbiens. Si la corporation ne veut pas se protéger tant pis pour elle ou les contribuables. Si la corporation ou le contribuable veulent endurer avec patience les empiètements et les troubles, c'est bien là leur affaire. Mais s'en suit-il que la corporation qui ne voudrait pas adopter les procédés reconnus en loi pour arrêter les envahissements sur les chemins ou pour faire disparaître des servitudes sur ses chemins ou l'aggravation de servitudes, aurait le droit de se débarrasser des obstacles, des embarras et des nuisances que l'on causerait sur son chemin, en les jetant ou en les transportant sur les propriétés voisines du chemin ? S'en suit-il que dans le cas actuel que la corporation qui ne fait rien, pour empêcher l'écoulement sur un des côtés du chemin des eaux sales, fétides, corrompues, matières fécales, immondes et une quantité considérable d'eau n'y coulant pas naturellement, s'en suit-il qu'elle ait droit de jeter toutes ces eaux ou la plus grande

partie sur les terrains avoisinants, et cela, au moyen d'une rigole qui attire les eaux d'un côté du chemin et les transporte chez le demandeur ?

Il nous semble que c'est là une illégalité flagrante dont peu de municipalités se sont rendues coupables.

En effet, les rigoles, d'après l'art. 771 sont faites pour faire communiquer les eaux d'un fossé à un autre fossé de l'autre côté du chemin, et non pour faire traverser ce chemin par les eaux pour ensuite les jeter directement sur les propriétés de l'autre côté du chemin, comme la chose a été faite depuis quelques années chez Desbiens.

La corporation ne peut écouler les eaux d'un chemin sur les biens fonds avoisinant le chemin, que dans le cas d'urgence ou de nécessité, et après l'homologation d'un procès-verbal, tel que requis par l'art. 772 qui dit :

“ Si, pour faire écouler les eaux d'un chemin, il est nécessaire de creuser un cours d'eau sur les biens fonds qui avoisinent ce chemin, ce cours d'eau est réglé par un procès-verbal fait sous l'autorité de l'art. 884, et ce cours d'eau est fait et entretenu par les personnes tenues aux travaux du chemin ou à leurs dépens par les propriétaires ou occupants de terrain dont les eaux s'écoulent ou doivent s'écouler par tel cours d'eau, selon qu'il est statué au procès-verbal.”

Comme on le voit, la loi municipale, d'accord avec la loi civile a respecté le droit de propriété, n'a pas voulu permettre aux corporations de prendre vis-à-vis des propriétaires riverains de telles cavalières désinvoltes, et n'a pas voulu que le fonds inférieur fut soumis à des charges, servitudes ruineuses d'un côté pour le propriétaire inférieur et toutes favorables pour le propriétaire supérieur.

Si la corporation s'était conformée à la loi citée, Desbiens, au lieu de faire des travaux coûteux pour recueillir les eaux des terrains supérieurs, aurait été laissé dans la même position qu'avant, et ce sont les propriétaires supérieurs qui auraient été tenus de faire sur la propriété de Desbiens l'excédant des travaux nécessaires pour l'écoulement venant de leur fonds.

Et nous ajouterons que les propriétaires seuls avaient in-

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térêt à demander ce procès-verbal. Car la loi municipale, art. 881, a réaffirmé l'art. 501 C. C. en déclarant que nul n'est tenu de faire ou d'aider à faire, en aucune manière, sur son propre terrain, un cours d'eau d'une profondeur plus grande que celle qui lui est nécessaire pour l'écoulement de ce terrain.

En résumé nous disons que le recours négatoire adopté par Desbiens contre la corporation, pour faire cesser l'aggravation de servitude, c'est-à-dire de l'écoulement des eaux provenant du chemin qui ne coulent pas naturellement sur son terrain et qui y coulent en plus grande abondance qu'auparavant, que ce recours lui résulte de la négligence de la corporation et de son refus illégal de faire cesser l'écoulement des eaux sur son chemin, eaux qui aussi n'y coulaient pas naturellement; d'avoir permis que son chemin fut le réceptacle d'immondices et d'eaux sales, et qu'il servit d'égout des latrines et des étables des trente-neuf emplacements.

La corporation, dans l'espèce, est responsable de son inaction, de son fait négatif qui ont été la cause déterminante de l'aggravation de la servitude et des dommages en résultant.

La corporation a aussi soutenu que si Desbiens avait un recours, il ne pouvait l'exercer que contre ceux qui jetaient les eaux et les eaux sales dans le chemin.

Cette prétention n'est pas légale.

Si Desbiens souffre d'un dommage, le fait en est dû au délit commun de la corporation et des propriétaires au sud-est du chemin. Desbiens aurait pu exercer un recours solidaire contre eux tous, mais ce recours ne le privait certainement pas de l'action négatoire contre la corporation, qui est la cause directe et immédiate quant à Desbiens des dommages qu'il souffre.

Pour ces motifs, je suis d'opinion de confirmer le jugement de première instance avec dépens des deux cours et c'est l'opinion de la majorité de la Cour.

L. G. Belley, procureur du demandeur.

Alain & Lapointe, procureurs de la défenderesse.

COURT OF REVIEW.

MONTREAL, September 29th 1906.

Present :—TASCHEREAU, PAGNUELO & SAINT-PIERRE, JJ.BOURASSA v. THE CANADIAN PACIFIC
RAILWAY COMPANY.*Liability for tort—Act of Parliament of Canada—Railway Act—Loss of cattle straying on railways—Liability of railway companies—Negligence, wilful act or omission of owner of cattle.*

HELD :—Under §4 of sect. 237 of the Railway Act (3 Ed. VII, cap. LVIII) an act of the Parliament of Canada, which provides that railway companies shall be liable for the loss of cattle killed on their roads, except when it is proved that such cattle “got at large through the negligence” or wilful act or omission of the owner or his agent, no liability whatever is incurred by the company for contributory negligence or otherwise, when the case falls within the exception.

The judgment under Review was rendered in the Superior Court, CURRAN, J., on the 16th of February 1905 as follows :—

CURRAN, J. :—

Whereas plaintiff alleges that at the parish of St Philippe, in this district, on the 12th of January 1905, at about eleven o'clock in the forenoon at the place where the public highway leading from St Philippe de Laprairie is traversed by the railway of the defendant, a freight train passing said point struck and killed a two year old mare belonging to plaintiff, of the value of \$90.00 and wounded another mare belonging to him causing a damage of \$50.00.

That the said animals had left their enclosure and were being followed by plaintiff and his servants who would have succeeded in capturing them on the public highway if the railway of defendant had been provided with culverts or other obstructions required by law to prevent animals from going on the track.

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That in consequence of such omission on the part of defendant said mares of plaintiff ran along defendant's track where they were run over by the trains of cars. Which the employees of defendant might have avoided if they had stopped said train as they could well have done before reaching said point where the damage was done.

That the said damage to plaintiff occurred through the fault of defendant's employees and of the defendants themselves in the first instance by the fault of said employees in not stopping said train of cars and in the second by the absence of culverts or other obstructions as aforesaid and plaintiff brings suit for the sum of \$140.00.

Whereas defendants plead as follows :

That the accident in question was solely due to the negligence of the plaintiff or his representatives in permitting the horses to get loose and to run at large on the public highway to the railway track.

That the horses got at large through the negligence and wilful act and omission of the plaintiff or his representatives who permitted the said horses to be loose in a yard from which the gate had been removed and neglected and omitted to attach them or otherwise keep control of them.

That if it had not been for the fault and negligence of the plaintiff or his representatives as aforesaid, no accident could have occurred.

That the railway track was in the proper and usual condition in every respect and the train in question was conducted and equipped in the proper and usual manner.

That the accident in question was not due to any fault or negligence on the part of the defendant or its representatives, but was unavoidable in so far as they are concerned.

That the plaintiff has not suffered the damage claimed.

That the defendant is not indebted to the plaintiff in any amount for any cause or reason whatever.

Considering that defendants have proved by the evidence of plaintiff himself, that the said animals escaped from his own land and reached the highway and thence of the track of

defendants by his own fault, in not having any gates or something therefor, on his own property, to prevent said animals from going out of his enclosure, after they had passed the first chain, then that there was a gateway which plaintiff left opened without any protection whatever.

Considering that defendants have proved that they are entitled to the benefit of subsection four of section 237 of the Railway Act (third Edward VII, chap. 58), having proved the fault of plaintiff through said negligent omission.

Considering that the said animals were on the railway track of defendant by the fault of said plaintiff.

Considering that the evidence discloses that the engine and freight cars of the defendants were at a distance of three acres from the said animals of plaintiff when they got on said railway track and that defendants' servants had ample time to spare to stop the train which was going at a very moderate rate of speed before reaching said animals.

Considering that defendants and their servants are bound to use the franchise which they enjoy prudently and that they have no right so to exercise their privileges as to do unnecessary injury to any one.

Considering that said animals were injured or killed by the common fault of plaintiff and defendant and each in a like degree and that each must bear an equal proportion of the damage.

Considering that said plaintiff has proved the damages alleged \$140.00.

Doth adjudge and condemn defendants to pay and satisfy unto plaintiff the sum of \$70.00 with interest from the date of the institution of this action and costs of Circuit Court.

JUDGMENT IN REVIEW.

TASCHEREAU, J. :—

In this case, although the amount of condemnation is very small indeed, the question at issue is of great importance es-

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pecially to the defendant, and to the other railway companies of this country.

The facts of the case are not disputed, and may be summarized as follows : the plaintiff is a farmer living in the parish of St Philippe. On the 12th January 1905, two unbroken colts belonging to the plaintiff, two years and three years old respectively, escaped onto the public road from the plaintiff's land, owing to the fact that the plaintiff's gates had been removed for the winter season, and the colts were only followed by an eight year old boy, and were without halters or any other means of restraint. They ran onto the railway track where one of them was killed, and the other injured by a passing train. The plaintiff himself had been in the habit of taking the colts each morning from the barn to a well some distance away, to water them. They were quite unbroken and could not be led by means of a bridle.

The day before the accident, the plaintiff had commenced to thresh his grain by means of a threshing machine in one end of the same barn in which the colts were kept, and on the morning of the accident, as he was busy at the threshing machine, he let the two colts out of the stable, and instead of taking them himself, he sent his eight year old boy alone with them, to the well, where his wife was busy drawing water. The child followed the colts to the well, and was alone following them back towards the stable, when they took fright at the unusual noise of the threshing machine, or for some other reason, and the little boy of course had no control over them. The colts ran to the gate of the field in which the barn and the well were situated. The gate itself had been previously removed, and a chain had been hung in the opening. The colts ran against this chain and knocked it down. They then ran across another field belonging to the plaintiff in which his house is situated, and through an open gate which leads from that field onto the public road. This gate had also been removed by the plaintiff shortly before the day of the accident. The colts then ran down the public road to the railway crossing, and apparently because the railway track

was freer from snow than the highway, they turned onto the track just as a train was approaching. The cattle guards had been removed for the winter, as usual. The train struck the colts at about an acre and a half distance from the crossing. It was a heavily loaded freight train, and necessarily took some distance to stop.

The trial judge found that the plaintiff has established damages to the extent of \$140. but reduced that amount by half on account of his finding that the accident was due to contributory negligence on the part of both parties.

Now, the question before us lies in the interpretation of paragraph 4 of section 237 of the Railway Act (3 Edward VII, cap. 58) which is new law, but was in force at the time the plaintiff's cattle were killed and injured, and which reads as follows : " When any cattle or other animals at large upon " the highway or otherwise get upon the property of the com- " pany and are killed or injured by a train, the owner of any " such animal so killed or injured shall be entitled to recover " the amount of such loss or injury against the company in " any action in any Court of competent jurisdiction, unless the " company, in the opinion of the Court or jury trying the case " establishes that such animal got at large through the negli- " gence or wilful act or omission of the owner or his agent"...

Therefore any wilful act or omission on the part of the owner or of his agent, is sufficient to destroy his right of action altogether. The learned judge in the Court below found that the plaintiff had established damages to the extent of \$140. but he reduced that amount by one half on account of his finding that the accident was due to contributory negligence on the part of both parties. Now, that is common law only, but we are now under the special law regulating the rights of railways and of proprietors. This is a special act, specially passed, by Parliament, which had a right to pass it, and it enacts special provisions which are at variance with the common law, but which are very clear in themselves, and this can bear no other interpretation than the strict interpretation to be given it.

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The question is not new. It has been decided in that sense already by the learned judges of this Court, notably by De Lorimier, J., on the 12th of March 1906 in a case of *Coulombe v. The C. P. R.* also by Mr Justice Saint Pierre in the case of *Gélineau v. The C. P. R.* also by Mr Justice Liddell in the Second Division Court of the United Counties of Stormont, Dundas and Glengarry on the 24th January 1905. So that there cannot be any doubt as to the interpretation to be given. If there was any doubt, all the judgments cited are in the same sense. There is not a single judgment interpreting the clause in any other way. All the judgments pronounced on the new law, have been pronounced in that sense only, so that we must hold that the jurisprudence is universal and general, and therefore that the learned judge in the Court below has erred in dividing the amount of condemnation between the defendant and the plaintiff on account of the fault being common. There can be no common fault—when the owner is in fault himself, he has no action. Whether the company be at fault, even in a larger measure, the moment the owner is found at fault he has no action. Well, there is no doubt in this case that the owner was at fault. He was at fault first, in having removed his two gates—the first gate mentioned in the judgment, and the second gate near his house where the animals finally escaped onto the public highway, and not replacing them properly. The first gate was replaced only by a simple chain, which necessarily unloosened or broke loose by the colts pressing against it. There was certainly fault there, and there was a second fault in the act of the plaintiff in confiding the care of his colts to a young child of eight years of age, without going himself, on the morning in question, especially as he was in the habit of going every day. There was a fault there. Well, that fault being acknowledged by the judgment, and being undoubtedly proved by the evidence, there follows only one conclusion, and that is, that the plaintiff has no action at all, and the action ought to have been dismissed, instead of the amount of condemnation being divided between the parties.

The judgment is therefore reversed and the action dismissed.

Pelletier & Letourneau, for the plaintiff.

Campbell, Meredith, Macpherson & Hague, for the defendant.

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COUR DE RÉVISION.

MONTREAL, 29 septembre 1906.

Présents :—TASCHEREAU, PAGUELO & SAINT-PIERRE, JJ.

DUPUIS v. VIAU & DEGUISE ET AL.

*Aliments—Exigibilité—Facultés de celui qui les doit —
Legs—Condition d'insaisissabilité.*

JUGÉ :—1o. Les aliments ne sont exigibles que dans la mesure des facultés de celui qui les doit. Par suite, le mari infirme et incapable de gagner sa vie, condamné par sentence de séparation de corps à payer quatre piastres par mois d'aliments à sa femme n'est pas tenu de les prélever sur une rente viagère annuelle de \$150. son unique ressource et qui ne suffit pas à le faire vivre.

2o. Une rente viagère léguée sous condition d'insaisissabilité ne peut être saisie pour une dette alimentaire due à une tierce personne.

La cour a confirmé unanimement le jugement inscrit en révision rendu en Cour Supérieure, TELLIER, J., le 5 novembre 1905, comme suit :

TELLIER, J. :—

Il s'agit de la contestation faite par la demanderesse de la déclaration des tiers-saisis en cette cause.

Les tiers-saisis ne doivent rien personnellement au défendeur, et comme exécuteurs testamentaires, administrateurs et légataires fiduciaires de feu Charles Théodore Viau, ils déclarent que le testament de ce dernier fait le 27 juillet 1893, devant M^{re} V. Lamarche, N. P., contient un legs en faveur du défendeur, d'une annuité ne devant pas excéder \$150. par

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année, à condition que les revenus de la succession le permettent et que le défendeur en ait besoin—le tout dans l'opinion et discrétion des exécuteurs testamentaires et légataires fiduciaires, qui en décideront absolument. Les revenus de la succession permettent de payer la dite annuité et le défendeur en a absolument besoin présentement, vu qu'il n'a pas d'autres ressources.

Par une autre clause du testament, cette annuité est déclarée absolument incessible et insaisissable et ne peut pas même être saisie pour aliments ou pour quelque cause que ce soit. Les tiers-saisis s'en rapportent à justice et ils ajoutent qu'en vertu de ce testament, exerçant leur discrétion, ils paient \$12. par mois aux personnes chez qui le défendeur prend nourriture et logement ; qu'ils ne lui mettent pas cet argent en mains. de sorte qu'il ne reste que \$6. par année pour ses autres dépenses ; que lorsque la saisie-arrêt a été signifiée aux tiers-saisis ils ne devaient rien au défendeur, car le dernier paiement avait été fait le 6 février 1905 ; et qu'ils devront faire un autre paiement au commencement de mars 1905, et ainsi de mois en mois. Les faits ainsi énoncés dans la déclaration des tiers-saisis sont absolument vrais.

Le défendeur est, depuis sept à huit ans, affligé de maladies du cœur et des reins qui le mettent dans l'impossibilité de gagner sa vie ; il est incurable ; et à part quelques sous qu'il gagne de temps en temps en servant de recors, il n'a pas d'autres moyens de subsistance que l'annuité que son frère Charles Théodore Viau lui a légué par son testament. Depuis la déclaration des tiers-saisis on exige \$13. par mois pour sa nourriture et son logement et il ne peut pas trouver de pension pour un prix moindre. Il a quatre enfants nés de son mariage avec la demanderesse et il ne leur demande rien afin qu'ils puissent mieux soutenir leur mère.

Dans ces circonstances, le défendeur ne saurait être condamné à partager avec la demanderesse l'annuité que lui a léguée son frère pour l'empêcher de mourir de misère, et qui est à peine suffisante pour cela. Il est bien fondé à contester

la saisie-arrêt et à demander que la demanderesse en soit déboutée avec dépens.

Celle-ci est séparée de biens du défendeur par leur contrat de mariage du 14 octobre 1871, et de corps, par jugement de cette cour qui a été rendu le 28 février 1903, qui lui a accordé, contre le défendeur, une pension alimentaire de \$4. par mois. Elle est pauvre et incapable de gagner sa vie ; elle a besoin de cette pension pour lui aider à vivre ; depuis le jugement en séparation de corps, le défendeur ne lui a rien payé et elle a été entretenue par ses enfants qui sont eux-mêmes pauvres.

Elle allègue vainement que ce que les tiers-saisis ont en mains appartenant et payable au défendeur est saisissable pour la dette alimentaire créée par le jugement et que toute disposition du testateur allant à dire, ou voulant rendre son legs au défendeur insaisissable, est illégale, nulle et de nul effet quant à la dette alimentaire susdite.

Si les somme et pension données par un testateur, à titre d'aliments, et déclarées insaisissables par l'article 599 du code de procédure civile, peuvent cependant être saisies pour dettes alimentaires ; cette disposition exceptionnelle ne peut être invoquée que par celui qui a fourni des aliments au bénéficiaire lui-même, et non pas par celui qui veut en avoir de lui.

La demanderesse est donc mal fondée à faire saisir-arrêter, entre les mains des tiers-saisis ès-qualité, l'annuité que le défendeur peut recevoir d'eux en vertu du testament de son frère, elle est non recevable dans les conclusions de sa contestation de la déclaration des tiers-saisis et par ces motifs elle en est déboutée, avec dépens.

D. A. Lafortune, pour la demanderesse.

Taillon, Bonin & Morin, pour les tiers-saisis.

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SUPERIOR COURT.

MONTREAL, October 1st 1906.

Present :—ARCHIBALD, J.THE CITY OF MONTREAL v. THE ESTATE OF
D. MILLIGAN & DE J. O'SULLIVAN, Oppt.*Interpretation of Statutes—Earlier and later statute—Repeal by implication.*

Held :—A provision in a city charter that one half of the cost of certain improvements shall be levied upon a class of tax-payers by ten annual instalments is not impliedly repealed, as to the division of the assessment into instalments, by a subsequent statute which alters the proportion of the amount to be levied from one half to three eighths without mention of the mode of payment.

ARCHIBALD, J. :—

In the month of June, 1902, the City of Montreal took proceedings under its charter against lot number 35 of St James Ward, belonging to the Estate David Milligan, the defendant, and advertised the same for sale for the payment of \$1094.25 alleged to be due to the City, for eight instalments, payable in eight consecutive years, beginning with April 1895 and up to April 1902 and, for a further sum of \$410.34 for interest on these different instalments, and a sum of \$3.99 for a special assessment, and the City advertised the lot above mentioned for sale to cover the amount.

On the 13th day of October, 1902, Dame Jane O'Sullivan, widow of the late John P. Cuddy, filed an opposition to the sale, setting up various informalities which have, however, now all been abandoned, but alleging, on the merits, that at the time of the proceedings taken by the City against the property, the claim was entirely prescribed. It was a contribution imposed upon the property in question for the widening of Notre-Dame street, and was payable by instalments in ten years.

The opposant contends that the whole claim was prescribed ; that the law relating to payment by instalments did not apply to the present case and that the whole amount of the contribution of the property, became due in 1895 and was prescribed by prescription of three years at the date of the commencement of the proceedings in this case and, subsidiarily, the opposant claims that in the event of the whole of the claim not being prescribed, certain instalments thereof were prescribed.

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The plaintiff contested the opposition on the ground that the roll making the apportionment for the widening of the street was contested, and the contestation was carried before all the courts and was only finally decided in 1901 and, that in consequence, prescription did not begin to run until that final decision.

This last question may at once be set aside, as it has been finally determined by the highest courts that the contestation of the roll of assessment does not interrupt the prescription. The provisions of law upon which this case rests and to be decided, are as follows : 52 Victoria, chapter 79, section 120
“ The right to recover any tax, assessment or water rate under this act is prescribed and extinguished unless the city, within three years, in addition to the current year to be counted from the time at which said tax, assessment or water rate became due, has commenced an action for the recovery thereof or initiated legal proceedings for the same purposes under the provisions of this act.”

54 Vict. chap. 78, sec. 2 is as follows :— “The City of Montreal is authorized to make and execute the following improvements, to widen Notre-Dame street from Lacroix street to Papineau avenue on the north-west side, according to the homologated plan of the city for St Mary and St James wards and in accordance with the formalities prescribed by the said charter, the cost of such widening shall be paid, one half by the city and the other half by the proprietors of immovables situated on each side of the said portion of Notre-Dame street to a depth of fifty feet, on an apportionment levied and paid in accordance with article 243 of the charter.”

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This article 243 there referred to is contained in the statute above cited, 52 Victoria, chap. 79 and refers to the widening of St Lawrence street. That article, as far as it need be cited, is as follows :—"The cost of such improvement shall be borne as follows :— one half by the city and one half by the owners of immovable property in that part of St Lawrence street lying between Craig and Sherbrooke streets by means of an assessment to be levied according to the by-laws of the council upon the immovable property situated on both sides of the said portion of St Lawrence street and payable in ten annual instalments, the first whereof to become due on the first day of May, after the confirmation and homologation of the report to be made by the Commissioners entrusted with making the valuation as heretofore indicated, and so to continue from year to year with interest at six per cent per annum, payable at the same date."

Then came 55 and 56 Vict. chap. 49, sec. 22 which provides as follows : "The cost of the expropriation made for the widening of Notre-Dame street between Lacroix street and Papineau avenue shall be paid as follows : one half by the city and the other half by the proprietors along said Notre-Dame street to a depth of fifty feet from Dalhousie square to Frontenac street". (No reference is here made to payment by instalments).

Then came 57 Vict. chap. 57, sec. 2 :—"The 4th paragraph of section 22 of the Act 55 and 56 Vict., chap. 49 (the one just above cited) is replaced by the following :—"The cost of the expropriation made for the widening of Notre-Dame street between Lacroix street and Papineau avenue shall be paid as follows :—five eighths by the city and the other three eighths by the owners of property bordering on the said Notre-Dame street to a depth of fifty feet from Dalhousie square to Papineau avenue."

The opposant contends that these two latter statutes dealing with the widening of Notre-Dame street, and which established different conditions for the payment of the cost of widening Notre-Dame street, without mentioning the applica-

tion of the statute relating to payment by instalments, had the effect of repealing the earlier statute which did make that mention, and of consequently making the whole apportionment fall due in one sum. If such were the case, it is clear that the whole apportionment would have been, at the date of the institution of the proceedings, prescribed, and the opposition would have to be maintained.

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I am of opinion that no principle for the interpretation of statutes can justify me in coming to that view. Maxwell on interpretation of statutes, 3rd edition, at page 214 remarks as follows :

" An author must be supposed to be consistent with himself and therefore, if, in one place, he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect the work of the legislature is treated in the same manner as that of any other author, and the language of every enactment must be so construed as far as possible, as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it, but it is impossible to will contradictions, and, if the provisions of the latter act are so inconsistent with, or repugnant to, those of an earlier act, that the two cannot stand together, the earlier stands impliedly repealed by the latter. "

That principle is adopted by all writers upon that subject, and has been translated into the jurisprudence of the country. The whole question then now, in respect of this matter is, is there anything in the change which was made in relation to the payment for the widening of Notre-Dame street, inconsistent with the provisions of the statute of 54 Vict. which gave the proprietors taxed for that widening, the right to pay in ten annual instalments ? I am clearly of opinion there is nothing inconsistent between the two.

The earlier statute then, providing for payment by instalments was not repealed by the later ones. The roll was ho-

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mologated and deposited in March 1895, and the first payment became due on the first day of May, 1895, under the provisions of article 243 of the 52 Vict., chap. 79, and the others on the first day of May of each succeeding year until the whole ten were paid.

The question has arisen and was debated in argument before me, as to whether the expression, "*current year*" contained in article 120 of 52 Vict., chap. 79 can have any reference to a payment such as the ones in question in this cause. That section speaks of the right to recover any tax, assessment or water rate. Is an apportionment for a supposed benefit received by the widening of the street laid and ascertained and due in full at a given date, a tax, or assessment, within the meaning of said article 120 ? Doubtless, the expression "*current year*" has usually application to debts which are growing due from day to day such, for example, as license charges, or ordinary taxes or interest, whereas the debt in question in this case is one which became complete as a capital sum, before all of these proceedings, and nothing was delayed, except its exigibility. It was not growing due from year to year ; it was previously due, but was only made exigible by instalments during a course of years.

There is much which might be said in favor of the opposition, that the expression "*current year*" would not apply to such a debt. That, however, has been determined by authority, and is not for me at the moment an open question. Therefore, I must hold that the expression, "*current year*" does apply to the present case, but, if it does apply to the present case, it ought to be given some meaning which it manifestly would not have, unless the tax which is to be paid on the first of May in each year is a tax which refers to the year running from the first of May of the year in which it is due, to the first of the following May, that is to say, unless it be assumed that the amount payable on the first day of each May is so payable in advance for the year to come. I think then, that from that point of view, as well also as from the general practice of the city, that all taxes are payable in advance and refer to the year running from the first of May to first of

May which follows, that it must be held that an amount which was due on the first of May 1902 was for the current year when these proceedings were initiated and that, therefore, that tax and three others are not prescribed.

That is the conclusion to which I come, and the opposition would be maintained only, with respect to the amounts falling due on the first of May 1895, the first of May 1896, the first of May 1897 and the first of May 1898, and would be rejected for the amounts falling due on the 1st of May 1899, 1st of May 1900, 1st of May 1901 and 1st of May 1902, making altogether a principal sum of \$547.12, with interest for five years from the date of the commencement of the proceedings, at six per cent, and also the sum of \$3.99 for a special assessment not contested.

As the opposant gains for one half and the plaintiff gains for one half, each party will pay their own costs.

The same judgment is rendered in another case concerning lots numbers ninety-six and part of lot one hundred and twelve of St James Ward wherein the City of Montreal is plaintiff, and Dame Jane O'Sullivan, defendant and said Jane O'Sullivan, opposant and City of Montreal, contestant.

Coyle & Tétreau, for the City of Montreal.

Beaudin, Loranger & Saint-Germain, for the opposant.

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COUR SUPÉRIEURE.

ARTHABASKA, 15 octobre 1906.

Présent :—MALOUIN, J.

BLOUIN v. THE JOHNSTON COMPANY.

Responsabilité—Accident du travail—Exploitation dangereuse—Défaut des employés de se conformer aux ordres du patron touchant précautions à prendre.

Jugé :—Le patron dont l'industrie nécessite des opérations dangereuses est responsable d'un accident à un ouvrier causé par le défaut de ses employés

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de suivre les ordres qu'il leur donne touchant les précautions à prendre. Par suite, une compagnie minière est passible des dommages soufferts par un ouvrier à la suite de l'explosion de substances explosives laissées et oubliées dans un forage de rocher, après un essai manqué de minage, par les employés chargés de le curer.

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MALOUIN, J. :—

La défenderesse est propriétaire de mines d'amiante dans le canton de Thetford et les exploite pour son compte.

Au printemps de 1902, le demandeur était à l'emploi de la défenderesse en qualité de aide-foreur (*drill helper*) ; il travaillait avec Louis Racine dans le puits No 2. Le matin du 2 juin, en arrivant à l'ouvrage vers sept heures, le demandeur constata qu'il y avait dans le puits No 2, de soixante à soixante-quinze pieds environ de l'endroit où il travaillait la veille, un immense morceau de pierre qui s'était détaché du flanc du rocher, puits No 3 et était tombé là. Le demandeur s'approcha de ce morceau de roc et introduisit dans un trou qui y était pratiqué, une barre en acier pour constater si ce trou était assez profond pour recevoir la dynamite et une explosion se produisit. Le demandeur eut la main gauche et une partie du bras gauche brûlés. Il a perdu l'usage de l'œil gauche pendant quelques jours, et sa vue (les deux yeux), est grandement affaiblie, apparemment pour le reste de ses jours. Le tympan de l'oreille gauche du demandeur a été perforé, celui de l'oreille droite endommagé. L'oreille gauche a abou-ti plusieurs fois depuis cette explosion. Le demandeur a été deux mois sans pouvoir travailler et d'après les probabilités, il ne pourra pas recouvrer son ancienne capacité de travail.

Le demandeur a intenté la présente action en dommages au montant de deux mille piastres contre la compagnie défenderesse. Cette dernière plaide qu'elle n'est nullement responsable de l'accident qui est arrivé au demandeur ; qu'il ne devait pas toucher à cette pierre, encore moins sonder le trou, comme il l'a fait avec une barre de fer ; que la pierre n'était pas à l'endroit où le demandeur avait mission de travailler ; qu'il est allé faire ce sondage contrairement à son devoir et, partant,

à ses risques et périls ; que c'est dû à sa négligence et à son incurie, si l'accident est arrivé.

Dix-huit mois avant l'accident en question, on avait miné le roc où était cette pierre, mais l'explosion ne l'avait pas détachée du rocher—elle avait toujours été là depuis. Tous avaient remarqué qu'il y avait un trou de pratiqué dans cette pierre, mais il était placé trop haut pour permettre aux hommes de voir s'il était vide ou rempli. La veille de l'accident Thomas Turcot et ses hommes, tous employés de la défenderesse, ont fait tomber ce bloc de pierre dans le puits No 2 où travaillait le demandeur et le deux juin au matin, l'accident dont le demandeur se plaint a eu lieu dans les circonstances déjà relatées.

La preuve établit qu'il est d'usage, dans ces mines, de pratiquer dans le roc une série de trous que l'on charge de matière explosive et à une heure fixée dans la journée, toutes ces mines sont déchargées simultanément par une étincelle produite par un courant électrique qui met le feu à l'amorce. Il arrive quelques fois qu'une ou plusieurs mines ratent, c'est-à-dire, ne font pas explosion. Le devoir alors de l'employé en charge c'est de faire vider ces trous ; ce sont du reste les instructions données aux employés des mines de la compagnie défenderesse, comme l'a dit son gérant, M. Johnson, entendu comme témoin.

Il y a dix-huit mois, quand on avait miné dans le flanc du rocher, la mine en question avait évidemment raté ; n'avait pas fait explosion, et, soit oubli ou négligence, les hommes en charge de cette mine n'avaient pas vidé ou curé le trou où se trouvait la matière explosive. Cependant, vû les instructions données et la coutume suivie, tous étaient sous l'impression que ce trou de mine qui se trouvait dans cette pierre n'offrait pas de danger, parce qu'il avait dû être vidé et curé en son temps. Evidemment, c'est la raison pourquoi, lorsque cette partie de roc est tombée dans le puits No 2 le premier de juin 1905, aucun avertissement n'a été donné et aucune précaution n'a été prise pour prévenir un accident. Il y a eu certainement négligence de la part des employés de la défenderesse et

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cette dernière est responsable de l'accident survenu au demandeur et des dommages qu'il a soufferts.

La défenderesse soutient que le demandeur n'avait pas reçu d'instructions lui permettant de travailler sur ce morceau de roc et qu'il a été imprudent en sondant le trou avec une barre de fer. Il appert de la preuve que cette pierre est tombée dans le puits No 2 où le demandeur travaillait et que le déblaiement du puits faisait partie de son ouvrage. Aussi, dans l'après-midi de l'accident, ceux des hommes qui restaient ont reçu instruction de fendre la pierre et d'en enlever les débris.

Le demandeur en voyant ce trou a cru, avec raison, qu'il avait été vidé vu que c'était la coutume et qu'il n'avait pas reçu d'avertissement qu'il ne l'avait pas été. La négligence des employés de la compagnie défenderesse est certaine.

Le demandeur est âgé de trente-huit ans, marié et père de trois enfants âgés respectivement de quatre ans, trois ans et le dernier de vingt mois. Je crois que dans les circonstances un montant de \$800.00 est une indemnité raisonnable et c'est le montant que je lui accorde.

Pacaud & Morin, pour le demandeur.

P. H. Coté, C. R., pour la défenderesse.

SUPERIOR COURT.

MONTREAL, September 20th 1906.

Present :—DOHERTY, J.

HOGAN ET AL. v. EADIE ET AL.

Contract of marriage—Construction of covenant—Stipulation of dower—Dower of children—Renunciation to succession of father by children claiming dower—Syh-allagmatical agreement—Bargain do ut facias—Donation inter vivos—and mortis causa—Suspensive condition.

HELD :—10. A covenant in a contract of marriage that "the husband, in

"consideration of the renunciation of legal dower by the wife and of the love and affection he has for her, gives her a sum of money, to be taken from the clear assets of his estate, provided that she survive him, payable immediately after his death, monthly or otherwise as she may require, as a marriage portion in lieu of dower," with a further covenant that "if the wife predecease the husband, without issue, or having had issue such issue, having predeceased herself, her heirs shall have no right to the sum which shall vest in him the husband *à titre de réversion*," is not a stipulation of prefixed or conventional dower, nor a gift or gratuitous disposition, but a synallagmatical agreement or bargain that the husband shall pay the sum in consideration of the renunciation by the wife of her dower rights. Hence, in the event of the predecease of the wife leaving children issue of the marriage, and of such children being her heirs-at-law, she having died intestate, they have the right to be paid the sum out of their father's estate, not by right of dower (*à titre de douairiers*) but as the representatives of their mother. They are not bound, therefore, as a condition precedent to the recovery of the sum, to renounce the succession of their father, or any benefit accruing to them under his will.

20. Even in the view that the above marriage covenant is gratuitous or a gift, it is a donation *inter vivos* and not *mortis causa*, nor is it subject to a suspensive condition that the donee survive the donor.

DOHERTY, J. :—

This case is before the Court upon a reference under article 509 C. C. P.

The solution of the questions presented depends upon the interpretation to be given to the terms of a disposition made by the late Henry Hogan in favor of his wife Agnes Louisa Eadie—also deceased—in the contract of marriage between them executed on the 8th November 1861.

The claimants are the children issue of the marriage of Henry Hogan and Agnes Louisa Eadie.

The contestants are the executors of the last will of late Henry Hogan.

The former claim to be, under the disposition aforesaid, made in favor of their mother, and, as they say, impliedly in their favor, entitled to the sum of \$8,000.00 given her by the terms of the disposition. The latter contest this claim.

The disposition in question is set forth in the following terms :—"And in further view of the said intended marriage and in the presence of us notaries, the said Henry Hogan, for

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1906 " and in consideration of the renunciation of dower by and on
 — " the part of the said Agnes Louisa Eadie, and the love and
 Hogan *et al.* " affection which he hath and beareth for the said Agnes Louisa
 v. " Eadie, did and doth hereby give, grant and confirm to the said
 Eadie *et al.* " Eadie, did and doth hereby give, grant and confirm to the said
 Doherty, J. " Agnes Louisa Eadie, accepting thereof, the sum of eight thou-
 sand dollars to be taken from the clear assets of his estate, pro-
 vided always that she, the said Agnes Louisa Eadie, survive
 him, the said Henry Hogan, payable immediately after his
 death to her, the said Agnes Louisa Eadie, monthly or other-
 wise, as she may require the same.

" To have and to hold the said sum of \$8,000. unto and to
 the use of the said Agnes Louisa Eadie her heirs and assigns
 for ever, provided always, she survive him the said Henry
 Hogan.

"It is hereby expressly agreed and covenanted that the said
 sum of \$8,000. said currency, so to be paid to the said Agnes
 Louisa Eadie, shall be so paid to her as a marriage portion and
 shall be in lieu, bar and satisfaction of dower of every de-
 scription, and every other matrimonial right or advantage
 whatsoever which, by the laws of the said heretofore Provin-
 ce of Lower Canada, she, the said Agnes Louisa Eadie might
 or could claim by reason of the said intended marriage, in
 the event of her surviving the said Henry Hogan.

"It is however expressly understood, covenanted and agreed
 that in case the said Agnes Louisa Eadie predecease the
 said Henry Hogan without issue, or, having issue, such is-
 sue predeceasing herself, the heirs and representatives of
 the said Agnes Louisa Eadie shall have no right to the said
 sum of \$8,000.00 and the same shall, from the moment of
 the death of the said Agnes Louisa Eadie, vest in the said
 Henry Hogan, *à titre de reversion*, and he shall remain ac-
 quitted and discharged, as regards the heirs and representa-
 tives of the said Agnes Louisa Eadie in the premises."

The clause in the marriage contract immediately preceding
 this disposition reads as follows :

" And it was and is hereby expressly stipulated, covenant-
 ed and agreed by and between the parties that no dower of

“ any kind or description shall at any time hereafter by reason
 “ of the said intended marriage or otherwise ; accrue or become
 “ due to or be claimed by or for the said Agnes Louisa Eadie,
 “ or by or for the child or children which may issue of the
 “ said intended marriage, or other the heirs of the said Agnes
 “ Louisa Eadie, or by or for any person or persons whomsoever,
 “ notwithstanding the custom as Paris, “*Coutume de Paris*,”
 “ or every or any law, usage or custom of the said heretofore
 “ Province of Lower Canada, to and from all and every of
 “ which, in respect of dower, the said parties to these presents
 “ did and do hereby renounce and derogate, declaring the same,
 “ in every respect of dower, to be by them renounced to and
 “ wholly derogated from in the premises.”

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Agnes Louisa Eadie died before Henry Hogan, but left surviving her the present claimants, issue of her marriage with him. Neither of the conditions expressly set forth in the disposition, namely, her survival to her husband—in which case the sum was to be paid to her and had and held by her and her heirs and assigns forever—nor her predeceasing him without issue or having had issue and such issue predeceasing her, in which case the sum was to revert to her husband, was therefore fulfilled.

The claimants see in the fact that the reversion to the husband of the sum given was stipulated only in the event of the wife dying before him without issue surviving her, an implied donation of the sum to such of her issue as might survive her.

The contestants, on the other hand, invoke the absence of any express donation to the children and deny that there is any such implied donation as alleged. They contend that the disposition was in favor of the wife only, and that the mere fact that she predeceased the donor left the donation absolutely without effect, it being, in their view, a donation in contemplation of death. They see in the stipulation of the reversion to the donor, a purely superfluous precaution intended to emphasize the ineffectiveness of the disposition in the event of the predecease of the beneficiary, and deny that merely because this unnecessary stipulation is made, only for

1906 the case of the donees dying without issue, it can be interpreted
Hogan *et al.* as making effective, in favor of such issue, a disposition which,
v. under the clear terms of the preceding clauses of the deed,
Eadie *et al.* was ineffective, by reason alone of her predecease, in favor of
Doherty, J. the only beneficiary mentioned in it.

They furthermore contend that even if the children are to be treated as by implication included in the disposition made in favor of their mother, in the case of her predeceasing her husband, their father, then, the disposition is itself not a pure and simple donation, but the constitution of a conventional dower, to which the children can, under article 1467, have no claim unless they renounce their father's succession, which they have not done.

I cannot find, as the claimants do, in the terms of the condition invoked by them, any specific implied donation to the children of the contemplated marriage. Upon their existence or non-existence depends the right of reversion stipulated in favor of the donor. Should there be no children, the object of the disposition shall revert to him, should there be children living, then, apparently, for want of fulfilment of the condition, no such reversion is to take place. The children are, in the words of article 936 C. C., merely "named in the condition—*mis dans la condition*". As under that article which deals with the case analogous to the present one—where a substitution is made conditional upon the existence or non-existence of children, their being mentioned in the condition does not cause them to be deemed to be included in the disposition—it seems to me that the same rule should be applied here, and that from the mere fact that their existence may, under the stipulated condition, prevent the reversion to the donor of the object given, it does not necessarily follow, that there is any implied specific disposition in their favor. Just as in the case of article 936, the existence of children does not operate as creating a substitution in favor of such children, but merely defeats any further substitution which may have been made conditional on their being no children, leaving the immediate beneficiary absolute owner, so here, it appears to me that

the effect of the existence of issue of the marriage in question at the death of the wife, is not to create by implication a disposition in favor of such issue, but merely to defeat the right of reversion conditionally stipulated in favor of the husband, and leave the disposition in favor of the wife to take its full effect, just as if there had been no stipulation of such right of reversion.

This being so, the question resolves itself into what was the nature of the disposition made in favor of the wife? Was it an obligation undertaken by the husband, for valuable consideration given by the wife, or was it a purely gratuitous disposition in her favor, or a donation by him to her? In the second case, was it a gift in contemplation of death, or even a gift *inter vivos* subject to the suspensive condition of the wife's surviving the husband—or was it a gift *inter vivos* subject to such suspensive condition, but having merely added to it a provision that its object, that is the sum given, was, in the event of the wife's surviving the husband, to be payable to her only after his death, and out of the clear assets of his succession?

I am of opinion that the disposition constitutes an obligation by the husband, undertaken for valuable consideration, conferring upon the wife the sum of \$8,000.00. In other words, the instrument witnesses an onerous contract between them, whereby, in consideration of the renunciation by the wife, for herself and children, of any dower, the husband gives her this sum of \$8,000. She renounced a valuable right which the law conferred upon her by reason of the marriage, and he gave her \$8,000.00 for doing so. Nothing, it seems to me, could be more far removed from a gift or donation, which is essentially a gratuitous disposition, that is, not merely not made in exchange for any value stipulated or received by the donor, but made in recognition or satisfaction of no right in the beneficiary, *nullo jure cogente*. Here the beneficiary, not only had by law a right in lieu and satisfaction whereof this sum was to be paid to her, if she survived, but her children also had a right, and the sum given is so given, in express terms, in

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consideration of the renunciation by her of those rights of herself and her children. The constitution of a conventional dower is in itself an onerous, not gratuitous, disposition, upon the ground alone that it is held to be made in satisfaction of a right, (Pothier, Douaire 5 et 6) and this, even where it exceeds the customary dower. Here, where a sum is given expressly as the price of the renunciation of any right to dower, it would appear as though, *a fortiori*, the disposition could not be considered gratuitous.

It is true that "love and affection" are also mentioned as considerations for the disposition. But the fact of the renunciation, its mention as the first consideration, and, more particularly, of the insistence that the sum, when paid to the wife, shall be in lieu, bar and satisfaction of any claim she would have in the event of her surviving her husband, all combine to shew that the \$8,000.00 was intended as a *quid pro quo*, the price of the renunciation.

The contract being onerous, the obligation to pay the sum of \$8,000.00 was a debt, of which the debtor could be relieved only in virtue of some stipulation contained in the deed, or some condition to which, by those terms, the indebtedness was subjected. Now, that instrument does contain provisions as to the mode and effect of payment, in the event of the creditor's surviving the debtor. It contains also provision for the debtor's being discharged of his obligation, in the event of the creditor's predeceasing him, leaving no children surviving her.

The condition on which this discharge depended having failed of fulfilment, the creditor died vested with the claim, and it passed to her heirs.

The claimants are those heirs. They are therefore entitled to the sum claimed.

This seems to me to be the effect of the agreement, looked upon as an onerous contract. And, for the reasons above given, it does not seem to me possible to consider it as anything else. The formal judgment is based on this interpretation of the contract,—This conclusion renders it unnecessary to examine the questions above mentioned as arising, in the event

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of the disposition being considered gratuitous, namely, was it a donation *mortis causa*, a donation *inter vivos* subject to a suspensive condition, or a donation *inter vivos* pure and simple? As these questions are interesting, I have, notwithstanding its being unnecessary for the determination of the case, to decide them, examined them, with the result that I reach the conclusion that, even assuming the disposition in question to be gratuitous, the claimants would, even in that case, be entitled to the sum demanded.

The question whether the disposition, assuming it to be gratuitous, was, on the one hand, a *donatio mortis causa*, or a donation *inter vivos* subject to a suspensive condition, or, on the other hand, a gift *inter vivos* pure and simple, is of practical importance, because upon its solution depends the practical question: Was the wife's having any right at all transmissible to her heirs—whether children or others—dependent upon her surviving her husband, or had she, from the moment of the donation, a vested right in the sum given transmissible by her, (even though, by reason of her not surviving her husband, she should never be entitled personally to claim payment of the sum given) which right would be defeated only by the right of reversion stipulated in her husband's favor, in the event of her dying leaving no issue surviving her?

If the answer should be affirmative to the first of these alternative questions, then the claimants are without right. If, on the contrary, the second of these alternative questions is that which should be affirmatively answered, then, not because any specific donation was made to them as children of the marriage, but because, being children of Agnes Louisa Eadie and having survived their mother, who herself predeceased their father, their existence defeats the right of reversion stipulated in their father's favor, and being their mother's heirs, they take the right to the thing given with which she was vested at her death, they are entitled to the sum they claim.

The first of these alternative questions—namely, was the wife's having any right at all under the donation dependent

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on her surviving her husband ? — subdivides itself into two questions. Was the donation one in contemplation of death ? Was it, though *inter vivos*, subject to the wife's surviving the husband, as a suspensive condition ? If either of these two questions be affirmatively answered, then the claimants are without right. Agnes Louisa Eadie having had no right she could transmit none.

Reading the clause alone whereby the disposition is made, it would appear that the donation made was one in contemplation of death. This seems to me so, not by reason of the proviso or condition that the donee shall survive the donor. A donation may be *inter vivos*, though subjected to the suspensive condition of the donee's surviving the donor. Nor does the provision for payment immediately after the donor's death create any difficulty in the donation being a gift *inter vivos*. But what at first seemed to me conclusive in favor of the donation being considered as *mortis causa*, is the provision that the money given is to be taken from the clear assets of the donor's estate.

No man has an estate, in the sense in which the word is here used, that is, a succession, till he is dead. And where he gives something as forming part of his succession, or to be taken out of the clear assets of such succession, it would appear that he gives only in so far as the thing given will form part of, or will be found in his succession, or in so far as there will be, in his succession, clear assets out of which it may be taken. So disposing, he disposes in contemplation of death, since he remains master of the thing given till his death, and is subject to no obligation towards the donee to see that it shall form part, or be found in his succession, and the latter's right only takes effect at all after his death. He creates, in the donee's favor, a right or claim, not against himself, but merely against his heirs.

But while this may be considered to be without qualification true, whenever the gift is of something as forming part of the donor's succession, it is not necessarily so, when a donation is made of a sum of money payable at, donor's death and to

be taken and of the clear assets of his succession. In such a case, while the intention of the donor may be (and, it may even be said, should, in the absence of anything indicating a contrary intention, be taken to be) to make his disposition conditional upon there being clear assets in his succession, out of which it may be paid, it may also be that the provision is inserted only as intending to insure the payment, out of the most available assets of the succession, of an indebtedness which the donor intended effectually and absolutely to create, by the donation and from its date, though making it payable only at his death. Which of these two intentions inspired the donor must be determined, in each case, by the context of the instrument containing the donation.

In this instance, the context shows, in the first place that the direction that the amount given be taken from the clear assets of the succession, is not necessarily, at all events, to be taken as intended to find its application in any and every case. It is, at the least, susceptible of being read as intended only to take effect in the case where the donee would survive the donor. And that it was in reality so intended and that the proviso or condition, "provided always that she the said Agnes "Louisa Eadie survive him the said Henry Hogan", should be taken as limiting to that particular case, the provision that the amount given is to be taken from the clear assets of the donor's estate seems, to me to result from the clause providing for what is to happen, in the event of the donee's predeceasing the donor, which clause, as will be pointed out, is quite inconsistent with an intention, on the donor's part, to make merely a donation *mortis causa*.

If this conclusion be correct,—and I think in a moment we will be able to shew it to be so,—the fact that it is only in the particular case of the donee's surviving the donor that provision is made that the sum given shall be taken from the assets of the estate, in itself negatives an intention on the part of the donor to make a mere donation in contemplation of death, which, having effect only at his death, would, by its nature, only be operative in the event of the donee surviving him and

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1906 necessarily payable by and out of the assets of his estate.
 — If such were his intention, the proviso or condition would be
 Hogan *et al.* v. to say the least of it, superfluous.

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 Doherty, J. his estate was intended to apply only to the case of survival
 of the donee to the donor, and, furthermore, that the latter was
 not, as he himself looked upon his own action, making a mere
 donation in contemplation of death, I have already said
 clearly, in my opinion results from the subsequent clause, in
 which he makes special provision for what is to happen in
 the event of the donee predeceasing him. This would have
 been quite unnecessary for the purpose of excluding any right
 on the part of the donee's heirs, had he contemplated the terms
 used as making of his disposition a mere gift *mortis causa*.
 His merely making such provision, had he in doing so pro-
 vided that in that case the donation should lapse or the donee's
 heirs have no right to the thing given, or even that the thing
 given should revert to himself, might not, it is true, have had
 great significance.

It might have been said, that in so doing, he, or the notary,
 was merely, for greater certainty, expressly stipulating the
 consequences the law would itself attach to the donee's prede-
 cease and that the use of the terms *à titre de reversion*, as
 descriptive of the title in virtue whereof the thing was to be
 the donor's, was merely an incorrect description of the cause
 which would give rise to the effect of the thing given being
 the donor's. But he has not stipulated a lapse or a reversion
 to himself in the precise case in which, by law, such lapse
 would take place and the thing given never have passed from
 him, were the donation one in contemplation of death. On
 the contrary, he has stipulated a reversion to himself in the
 event, it is true, of the donee's predeceasing him, but subject
 to the further condition that she should so predecease him
 leaving no issue. From this stipulation, it is evident that, in
 the intention of the donor, he was to have no right to the
 thing given, it was not "to vest" in him, but on the contrary,
 it was to belong to the heirs of the donee, should she predecease

him leaving such issue. This being so, it is apparent that he, the donor, did not consider that by the terms used in the preceding clauses, he had made in favor of the donee a donation *mortis causa*, under which, in no event, would the donee's heirs—she predeceasing *him* the donor—have any right. And it further necessarily follows that he recognized that, under the terms of the disposition he had made, she, the donee, was vested with the right to the thing given, subject to the terms and provisions, as to payment, in the event of her survival to him, specially stipulated, since it was only in virtue of her being so vested that her heirs (whether she had or had not issue) could have any right in it. Recognizing this right as vested in her, the donor necessarily recognized that the disposition by him made in her favor was a donation *inter vivos*, not one *mortis causa*.

So recognizing, he quite correctly described, in stipulating "that the thing given should vest in him *à titre de reversion*," the right he intended to secure to himself, in the event of her leaving no issue. A right of *reversion* being a right to take back something that has passed out of the patrimony of the stipulator, and not a right to retain something that had never so passed the stipulation of such a right is consistent with the donor's having made a donation *inter vivos*, and inconsistent with his having merely disposed *mortis causa*.

To conclude that he looked upon the disposition he had made as one merely *mortis causa*, we must therefore assume, not only that the donor was at pains to make utterly needless stipulations, but that he incorrectly described the right he intended to secure for himself, and stipulated that right only for the particular case of the donee predeceasing him without children, whereas, without any stipulation at all, he would have had it by reason of her predecease, whether she had or had not children. On the other hand, if we take the donor to have understood the terms he made use of, and meant what he said, then the conclusion is inevitable that, as he looked at it at all events, he had, by the disposition made by him, so alienated the thing given, as to render necessary the stipulations by him made

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in order that it should return to him, and to have intended that such return should take place only in the case in which he provided it should. Such an alienation was effected only if the disposition made was a gift *inter vivos*.

For these reasons, I am of opinion that the donation was not *mortis causa*.

The same reasons, lead to the conclusion that it was not made subject to the survival of the donee to the donor, as a suspensive condition. As has been pointed out, the terms of the clause stipulating the right of reversion to the donor justify the conclusion that the words "provided always that said "Agnes Louisa Eadie survive him the said Henry Hogan", are intended to limit or subject to a condition, the direction, that the sum given is to be taken out of the clear assets of the estate. This being so, they do not operate to subject the donation itself to a suspensive condition, consisting in the survival of the donee to the donor. All the reasons based on the clause stipulating, right of reversion, invoked as negating the intention on the part of the donor to make a donation *mortis causa*, apply with equal force against any contention that he was subjecting the donation made to the suspensive condition of the donee's survival to him. They need not be repeated. The repetition of the proviso after the clause "to have and to hold, etc" does not any further, in view of what follows it, imply that the donation itself was made subject to a suspensive condition. Its only effect is to declare that the donee and her heirs and assigns, absolutely and without condition, shall have and hold the object given, in the event of her surviving him. The subsequent clause determines what shall be the effect in the event of her predecease.

For the reasons hereinabove set forth, I conclude that the disposition in favor of Agnes Louisa Eadie, even if it should be treated as gratuitous, was neither a gift *mortis causa*, nor one subject to the suspensive condition of her surviving her husband. As I read the disposition the future husband gave to the future wife thereof accepting a sum of \$8,000.00. He then provided :

10.—That, in the event of her surviving him, this sum should be taken out of the clear assets of his estate, and paid to her immediately after his death, to be held by her and her heirs and assigns unconditionally, and that such payment so to be made to her, should be so made to her, as a marriage portion and be in lieu, bar and satisfaction of dower of every description and every other matrimonial right which *she* might or could claim *in the event of her surviving him* and 20.—That in the event of her predeceasing him without issue or having issue, such issue predeceasing herself, her heirs and representatives should have no right to the sum given, which should from the moment of her death, vest in him *à titre de reversion*.

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He made no provision as regards the mode of payment, or any reversion to himself, in the event of the donee predeceasing him leaving issue. This left the donation, in that event, to produce its full effect as a donation *inter vivos*.

In consequence, Agnes Louisa Eadie having predeceased her husband leaving issue surviving her, she died vested with the right to the sum of \$8,000.00 given her. That sum, or her right to it, passed to her heirs.

She having died intestate and the claimants, her children, being her heirs, her right to the sum passed to them. It is unnecessary here to examine whether they were bound to await their father's death to claim it—that event having taken place before their present claim was made. The contestant's pretension that if the claimants take this sum they take it as a *dower* to them, and consequently to do so must renounce any benefit under their father's will, is, in my interpretation of the deed, clearly unfounded. What the claimants take they take not as the children of Henry Hogan, but as the *heirs* of their mother. The fact that the sum paid to her had, she survived her husband, would have been so paid in lieu of dower or as a dower (if the latter be the effect of the terms used, with regard to the effect of any payment made to her had she survived, a question it is not necessary to determine) does not place them, when they come to enforce the right to that sum

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which passed to them as her heirs upon her predeceasing her husband, in the position of children claiming, as such, dower from their father's succession. In my opinion there was no disposition made in favor of the children, either as conventional dower or otherwise. In their own right they take nothing under the terms of the contract. There can therefore be no question of a claim to dower by them.

I am of opinion that the claimants, as heirs of their mother, are entitled to the sum claimed, and this without forfeiting or renouncing any rights under their father's will. In the formal judgment, I answer, in accordance with the conclusions herein reached, the specific questions submitted by the parties, and that judgment condemns the contestants to pay the amount claimed with costs. I give the claimants their costs, though the ground on which I think them entitled to succeed is not that on which they rested their claim. I do so because, as I take it, the substantial question which the parties wished decided was whether the claimants, on the facts as set forth, were entitled to the sum claimed, and their right to that sum is by the present judgment maintained.

Lafleur, MacDougall & Macfurlane, for the claimants.

W. Prescott Sharp, for the contestants.

COUR SUPÉRIEURE.

MONTREAL, 6 octobre 1906.

Présent : — CHARBONNEAU, J.

LEVINOFF v. FOURNIER.

Interprétation des lois—Procédure—Saisie-arrêt — Application de l'art. 1147a C. P. C.

Jugé :—L'art. 1147a C. P. C. (loi Lacombe) est une disposition générale, et,

nonobstant la place qui lui est donnée dans le code sous la rubrique "*Procédures devant la Cour de Circuit*," il s'applique aux saisies-arrêts pratiquées en exécution de jugements de la Cour Supérieure.

Cf. en sens contraire, *Larochelle v. Laroie & La Cie du chemin de fer du Pacifique*, 27 C. S. 534.

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CHARBONNEAU, J. :—

La cour, après avoir entendu les parties, par leurs avocats, sur l'inscription en droit du demandeur à l'encontre de la contestation faite par le défendeur de la saisie-arrêt de son salaire alléguant qu'il l'avait déposé sous l'opération de l'article 1147a C. P. C., la dite inscription en droit alléguant que cette disposition ne s'applique qu'aux dettes et matières du ressort de la Cour de Circuit et que le dépôt du salaire sous l'opération de cette loi ne peut empêcher la saisie par le porteur d'une créance de la juridiction de la Cour Supérieure.

Considérant que la localisation de la loi en question ne peut justifier une interprétation contraire au texte même qui paraît très clair, qu'une telle interprétation rendrait cette loi absolument illusoire et enlèverait aux salariés la protection contre les faux frais que le législateur avait l'intention de leur donner.

Considérant que d'après la dite loi, le dépôt de la déclaration assermentée du salaire du défendeur au greffe de la Cour de Circuit le rend indemne de toutes saisies ultérieures sur ses gages, que cette saisie émane de la Cour de Circuit ou de toute autre Cour.

Renvoie la dite inscription en droit avec dépens.

J. A. Molleur, pour le demandeur.

Monty & Duranleau, pour le défendeur.

COUR SUPÉRIEURE

MONTRÉAL, 20 octobre 1906.

Présent :—TELLIER, J.

LAMONTAGNE v. LECLERC ET VIR.

Servitude—Titre constitutif—Servitude de passage—Vente avec usage de rues conformément à un plan—Droits et obligations des propriétaires des fonds dominant et servant.

JUGÉ :—1o. La vente d'un immeuble désigné "lot No 5 de la subdivision "du lot No 212 du cadastre, etc," avec l'usage en commun avec toutes personnes y ayant droit des rues bornant le lot, lorsque le plan de subdivision précédemment, déposé pour enregistrement par le vendeur, contient l'indication d'une lisière destinée à servir de rue, est un titre constitutif de servitude de passage suffisant, et donne à l'acheteur le recours de l'action confessoire contre l'acquéreur subséquent de la lisière qui forme le fonds servant.

2o. C'est le propriétaire du fonds dominant qui doit faire les travaux nécessaires à l'établissement et à la conservation du passage sur le fonds servant. L'obligation du propriétaire de ce dernier se réduit à subir la servitude et à rien de plus.

TELLIER, J. :—

Par acte passé, à Montréal, le 21 août 1896, devant M^{re} P. Mainville, notaire, Olivier M. Augé et Edouard J. Augé vendirent et cédèrent au demandeur un terrain désigné comme suit : "Un lot de terre connu et désigné comme étant le lot "numéro cinq de la subdivision du lot numero officiel deux cent "douze (212-5) sur les plan et livre de renvoi officiels de la "paroisse de la Pointe aux Trembles, comté d'Hochelaga, avec "l'usage en commun avec toutes personnes y ayant droit des "rues bornant les dits lots de terre."

Ce lot de terre, dont le demandeur est encore propriétaire, faisait partie d'une terre originairement No 212 du cadastre de la Pointe aux Trembles, acquise par les vendeurs Augé, avec une autre terre originairement No 211 du même cadastre, et les deux terres avaient été par eux précédemment divisées en

lots dûment cadastrés et décrits sur un plan fait par A. Michaud, arpenteur provincial, en date du 11 juillet 1895.

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Par acte passé, à Montréal, le 30 décembre 1902, devant M^{re} P. C. Lacasse, notaire, Dame Méline Roy, veuve d'Olivier M. Augé, et les autres intéressés dans les deux immeubles, vendirent à la défenderesse les immeubles ci-après décrits et situés dans la paroisse de la Pointe aux Trembles, dans le comté d'Hochelaga, savoir : 20.—Les lots connus et désignés aux plan et livre de renvoi officiels du cadastre hypothécaire de la paroisse de la Pointe aux Trembles, comme étant les lots numéros un, deux, trois neuf, dix, treize, deux cent deux de la subdivision officielle du lot numéro originaire deux cent douze des plan et livre de renvoi officiels du cadastre de la paroisse de la Pointe aux Trembles ; et ils lui firent, par le même acte, un transport de partie de toutes les créances leur résultant de certaines ventes au nombre de seize, faites par Olivier M. Augé et Edouard J. Augé à divers acquéreurs, et spécialement au demandeur, par l'acte de vente sus-mentionné passé le 21 août 1896, et enregistré au bureau d'enregistrement des comtés d'Hochelaga et Jacques-Cartier, le 21 septembre 1896, sous le No 63523.

Par quittance passée, à Montréal, le 7 avril 1904, devant M^{re} C. E. Leclerc, notaire, la défenderesse a reconnu avoir reçu du demandeur la balance, en capital et intérêts, du prix de la vente du 21 août 1896, déclaré qu'elle était devenue créancière de cette balance du prix de vente, aux termes de l'acte de vente et transport susmentionné, passé en sa faveur le 30 décembre 1902, et enregistré au susdit bureau d'enregistrement, le 27 novembre 1903, sous le No 104,059.

Le lot de terre acquis par le demandeur est borné en front par les lots de terre numéros un, deux et trois de la subdivision du lot originaire numéro deux cent douze du cadastre ; ces derniers lots, de même que le numéro 202 de la même subdivision, qui ont été acquis par la défenderesse, sont indiqués comme constituant une rue de soixante pieds de largeur et s'étendant depuis le chemin public jusqu'au fleuve, d'après les plan et livre de renvoi de la subdivision ; ils ont été labourés,

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hersés et arrondis par les auteurs des parties en cause ; mais ils n'ont jamais été ouverts, ni livrés comme rue, et ils sont toujours restés fermés et séparés du chemin public par un fossé, une clôture et une double rangée d'arbres.

Lorsqu'un propriétaire divise ainsi son terrain en lots à bâtir et indique certains lots comme devant servir de chemins ou rues à l'usage des autres lots qu'il se propose de concéder pour y bâtir, il contracte implicitement envers ceux auxquels il concède ensuite des terrains ainsi indiqués comme lots à bâtir, l'obligation de leur donner un droit de passage sur les lots par lui indiqués comme devant servir de chemins ou rues, si l'autorité municipale ne fait pas des voies publiques des lots destinés à être convertis en chemins et rues.

D'un autre côté, comme la servitude de passage est une servitude discontinue et non apparente, son titre constitutif ne peut être opposé aux tiers qui ont acquis le fonds servant, et fait enregistrer leurs titres que s'il indique clairement la servitude, et ait été dûment enregistré avant l'enregistrement des titres de tels tiers acquéreurs.

Dans l'acte d'acquisition, par le demandeur, du lot de terre susdécrit, il n'est aucunement question, sans doute, de la servitude de passage comme d'une servitude, mais cet acte qui a été dûment enregistré, faisant mention que ce lot de subdivision était vendu *avec l'usage en commun avec toutes personnes y ayant droit des rues bornant les dits lots de terre* il y avait là une désignation de la servitude de passage suffisante pour porter son existence à la connaissance de tous les tiers, et spécialement de la défenderesse qui, après telle vente et son enregistrement, faisait l'acquisition de lots de terre de la même subdivision, et spécialement de ceux bornant le lot du demandeur et indiqués comme rue, sur les plan et livre de renvoi officiels.

Le terrain du demandeur aurait été enlevé et n'aurait eu aucune issue sur la voie publique, par suite de la vente qui lui était faite, si ses vendeurs ne lui avaient pas accordé l'usage de la rue qui le bornait.

Dans les circonstances, il existe sur les lots de terre numéros

1, 2, 3 et 202 de la subdivision du lot originaire numéro 212 du cadastre officiel, ainsi acquis par la défenderesse, un droit ou servitude réelle de passage pour l'utilité du susdit héritage appartenant au demandeur.

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La défenderesse, depuis son acquisition des lots de terre assujettis à ce droit de passage, n'a rien fait qui tende à en diminuer l'usage ou à changer l'état des lieux ; elle n'a jamais empêché le demandeur de jouir de son terrain ou d'y communiquer en aucune façon, soit pour l'utiliser en y érigeant des bâtisses, soit pour y poser des affiches aux fins de sa vente ou pour toutes autres fins ; elle ne lui a jamais nié, ni refusé son droit de passage ; elle n'a reçu de lui aucune réquisition à cet égard ; et elle ne lui a causé aucun préjudice quelconque.

Par son plaidoyer à l'action telle qu'amendée, la défenderesse déclare qu'elle a toujours été prête, et l'est encore, à accorder au demandeur, pour communiquer à son terrain le passage auquel il a droit ; elle conclut en réitérant cette déclaration et en demandant le renvoi de l'action amendée du demandeur, avec dépens.

Pour pouvoir intenter une action confessoire comme celle en cette cause, il ne suffit pas qu'une personne ait un droit de servitude, mais il faut que la personne en possession du fonds servant refuse de la lui laisser exercer.

Celui auquel est due une servitude a droit de faire tous les ouvrages nécessaires pour en user et pour la conserver, et ces ouvrages sont à ses frais et non à ceux du propriétaire du fonds assujetti, à moins que le titre constitutif de la servitude ne dise le contraire.

Dans l'espèce, le titre de propriété consenti au demandeur par ses vendeurs, stipule que la façon et l'entretien des trottoirs seront à la charge de l'acquéreur et qu'il en sera de même de l'entretien des rues.

La défenderesse soutient avec raison, dans son plaidoyer, que les auteurs du demandeur ne se sont jamais obligés de faire et ouvrir sur leur terrain, la rue demandée par l'action du demandeur et par son protêt du 12 juillet 1905 ; qu'ils n'ont jamais ouvert et livré au public, le terrain de la dite rue

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et qu'elle n'est pas tenue de faire, ouvrir et livrer la dite rue, pas plus que ne l'étaient ses auteurs.

Si la défenderesse est tenue de souffrir, sur ses terrains numéros 1, 2, 3 et 202 de la subdivision du lot originaire numéro 212, la servitude réelle de passage à laquelle le demandeur a droit, pour l'utilité et la jouissance du lot de terre par lui acquis et sus-désigné, il incombe à ce dernier de faire tous les ouvrages nécessaires pour user de cette servitude de passage et la conserver, et spécialement d'ouvrir la clôture sur le chemin public, d'y mettre et maintenir une barrière, et de faire et entretenir un pont sur le fossé du chemin public.

Les conclusions de la présente action telles que libellées originairement, ne pouvaient avoir et produire aucun effet utile et pratique pour le demandeur, puisqu'elles auraient laissé son terrain enclavé et sans issue sur la voie publique.

Sur les conclusions nouvelles et amendées de l'action du demandeur, et sur les conclusions nouvelles prises, après amendement, par la défenderesse qui se déclare prête à accorder au demandeur, le passage auquel il a droit, il y a lieu de dire et déclarer, par le présent jugement, que le demandeur a, pour l'utilité et la jouissance de son terrain susdécrit, une servitude ou droit de passage sur les lots de terre numéros un, deux, trois et deux cent deux du lot originaire numéro deux cent douze des plan et livre de renvoi officiels de la paroisse de la Pointe aux Trembles, appartenant à la défenderesse ; malgré que la défenderesse n'ait, avant la présente action, rien fait pouvant donner lieu à une action confessoire de la part du demandeur.

Les autres conclusions prises par le demandeur, tant originairement que par amendement, sont mal fondées et elles doivent être rejetées.

Jugement est rendu en conséquence avec dépens contre le demandeur, au profit de sa partie adverse, sauf néanmoins les frais d'assignation, de taxation et de déposition des témoins de la défenderesse, qui resteront à la charge de cette dernière.

A. W. Grenier, C. R., pour le demandeur.

Emard & Emard, pour la défenderesse.

SUPERIOR COURT.

MONTREAL, October 20th 1906.

Present :—SAINT-PIERRE, J.

SAVARD v. TREMBLAY.

Contracts—Construction of agreements—Agreement to convey movables—Breach of contract—Remedy—Attachment in revendication—Personal action.

HELD :—An agreement by which the maker of a note undertakes, in case it is not paid at maturity, to transfer to the payee, as security, certain specified movables of which he retains the possession in the mean time, does not give the payee the right to revendicate the movables after the note falls due and remains unpaid. The proper remedy in such a case is a personal action for breach of contract.

SAINT-PIERRE, J. :—

This is an action taken to revendicate certain movable effects, which the plaintiff claims are her property. The facts of the case are as follows : On the 18th of April, 1905, the defendant and his wife signed a promissory note in favor of the plaintiff for \$100, payable six months from its date. To guarantee the payment of the note, they gave the plaintiff a writing couched in the following terms : "We, the undersigned agree to make over to Dame Ulric Gagnon, to guarantee the payment of a note for \$100.00, which we have signed in her favor, all the movable effects and furnishings now in our house (here follows an enumeration of the effects), and in default by us to pay the principal and interest of said note, the said Dame Ulric Gagnon can take possession of our said effects without legal process. And it is further understood that from the moment we repay the amount of said note in principal and interest, the present guarantee will cease to exist and we will then redeem our ownership of the said effects mentioned in this writing." The note was not paid at maturity, hence the present action in revendica-

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tion. The plaintiff alleges, in substance : (1) that she is the only true owner and possessor of the movables revendicated ; (2) that she became owner of them in virtue of the above writing ; (3) that their value is \$301.50, but she consents to reduce this sum to \$125 ; (4) that the defendant unlawfully retains possession of the effects ; (5) that he refuses to deliver them to her, although thereto requested. The conclusions of the action are : Wherefore the plaintiff prays : (1) that she be declared the only and true owner of the effects ; (2) that the defendant, and guardian appointed herein, be ordered to deliver them to her ; (3) that in the event of it being impossible to make the seizure, or in the event of the seizure in revendication being dismissed, and that the defendant cannot deliver the effects to the plaintiff that he be condemned to pay her \$125, their value and she declares herself ready to return the note to the defendant upon receiving payment of that sum, or upon receiving possession of the effects, the whole, in any event, with costs. The defendant pleads a denial firstly, and then proceeds : (2) that in payment of the note of \$100, the defendant and his wife granted the ownership to the plaintiff of effects worth \$201.50 ; (3) that at time of the contract, the effects were not transferred to the plaintiff, but have always remained with the defendants, and were simply pledged to the plaintiff, and the defendant's wife has always been in possession of them as proprietor ; (4) consequently, the plaintiff has never acquired a right of pledge over and upon them and the guarantee is of no effect ; (5) that, in any case, the defendant could not pledge the effects for his own personal debt, since he was not the owner of them ; (6) that the plaintiff is not and never was the owner of the effects and never had possession of them. The dismissal of the plaintiff's action is demanded, with costs. Our law does not recognize a chattel mortgage, and the contract of pledge only commences to exist with the delivery. The effects mentioned in the private writing, which is the real cause of the present action, having never passed out of the defendant's possession into that of the plaintiff, it is evident that the plaintiff has no right to a

seizure revendication to obtain possession of them. In any event, the real sense of the writing in question is not that the contract of pledge took place immediately on the same date, but it was to come into existence later and only in case the note for \$100 was not paid at maturity ; but, as we have seen, the note was payable only six months from the date of the writing, viz., 18th April, 1905. In other words, the contract was a conditional one, the real tenor of which can be put as follows :—"We bind and oblige ourselves, by promissory note, in favor of Dame Ulric Gagnon, payable six months from 18th April, 1905, and in case said note is not paid at maturity, to deliver to said Dame Ulric Gagnon the following movable effects and furniture now in our residence under a title of pledge, the said effects to be and remain in the possession of said Dame Ulric Gagnon until payment of said note. On the day on which the said note is paid, said Dame Ulric Gagnon is to return to us said effects." This interpretation of the writing, in my opinion, cannot be doubted. It was clearly the intention of the parties that the contract of pledge was to take effect and come into existence, not on the date on which the writing is dated, but on the date of the maturity of the note, in case the defendant would make default to pay it. This explains why the effects remained in possession of the defendants also, and why the plaintiff only claimed them after the maturity of the note, that is to say, after the happening of the condition from which was of commence the contract of pledge. It is to be remembered that the following (translated) are the expressions used by the defendant and his wife : "We, the undersigned, agree by these presents to make over to Dame Ulric Gagnon to guarantee a note for \$100.00 all our movable effects." "They do not say that they pledge their movable effects to guarantee," etc., but "we agree to make over," which is equivalent to "we agree that our movable effects be pledged to Dame Ulric Gagnon to guarantee a note of \$100." But on what date ? "On the date of the maturity of the note, if we make default to pay it." What was to happen on the date

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of the maturity of the note if it was not paid to the plaintiff? The writing tells us in so many words : "The said Dame Ulric Gagnon can take possession of said effects." That is the putting into operation and the commencement of the contract of pledge by which the defendant and his wife had agreed to guarantee their indebtedness to the plaintiff. The plaintiff's possession of the effects, the writing goes on to say, will exist until such time as the note is not paid. When the note is paid, the effects are once more the property of the defendant and his wife. In my opinion, the contract in question is one of pledge or pawning, the execution of which was suspended by a condition. It is clearly in proof that not only the suspensive condition which was to have created the contract of pawning was realized, but, in addition, the plaintiff herself went to claim the effects she pretends were pledged to her, and she was refused them. Now, the further question arises : What is the remedy for the creditor thus deprived of his guarantee by the act of his debtor ? Can he take a real action, *de plano*, and revendicate the effects which his debtor obliged himself to give him to guarantee the payment of his indebtedness ? To do so, would make the creditor judge in his own case and condemn the debtor as being in the wrong. It is for the Courts and not for the creditor to determine this point. We are now deciding the merits of a contract, and the first question which arises is to find out whether or not the debtor has fulfilled his obligations under the contract. A buys a horse from B for the price of \$100. which he pays on the spot. B agrees to deliver the horse to A the following day, but refuses, or, at least neglects to do so. A could not, *de plano*, take out a seizure revendication to obtain possession of the horse he had bought ; he should take a personal action to compel his vendor to execute his contract. These rules apply in every particular to the case now before me. Instead of resorting to a real action, and instead of claiming, as being her property, the movable effects which the defendant had promised to the plaintiff to guarantee his indebtedness to her, the plaintiff should have taken a personal

action against the defendant and asked for a condemnation which would have had the effect of forcing the defendant to deliver to the plaintiff the effects she claimed, in default of the defendant paying his note of \$100. I arrive at the conclusion, therefore, that the present action in revendication is unfounded, and that the plaintiff's action should be dismissed. Consequently, the seizure revendication is set aside for all purposes as of right and *main levée* of it is granted to the defendant. The whole with costs against the plaintiff. At the hearing of the case, the plaintiff moved to be permitted to amend her declaration. As the purposed amendment would have for effect to change the nature of the action, it is impossible for me to grant it. This motion is also dismissed with costs.

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J. C. Lamothe, for the plaintiff.

J. J. Beauchamp, for the defendant.

SUPERIOR COURT.

MONTREAL, October 27th 1906.

Present :—ARCHIBALD, J.

BEAUVAIS ET AL. V. THE CITY OF MONTREAL.

Municipal law—Power to make by-laws—By-law to close shops during stated hours—Common law power to make “good government” regulations—Special power in charter of City of Montreal—Constitutional law—Powers of legislatures to enact laws—Interpretation of statutes—Act to enable municipal councils to pass early closing by-laws—Ultra vires.

Held :—10. A by-law of the city council of Montreal ordering all shops to be closed at seven o'clock in the evening on Wednesday and Thursday evenings each week, and to remain so closed until five o'clock the next morning, is not founded on, nor authorized by the common law power

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vested in municipalities to make police and other regulations for good government and the maintenance of public order within their limits. Nor does the section 140, the "good government clause," of the charter of the City of Montreal confer upon its council the power to make such a by-law.

20. An enactment by the Legislature of the Province of Quebec giving municipal councils in cities and towns the power to pass by-laws for the closing of shops of one or more categories, during certain prescribed hours of the day, does not fall under any of the heads enumerated in section 92 of the British North America Act and is therefore unconstitutional.

30. Even if the above enactment was constitutional, as it enables councils to pass by-laws only in reference to stores of one or more categories, a by-law passed for the closing of *all* stores does not conform to it and is therefore *ultra vires*.

ARCHIBALD, J. :—

This is a proceeding to set aside by-law No 328 known as the early closing by-law. This by-law on its face purports to have been passed in virtue of the provisions of 57 Vict., cap. 50 and of 4 Ed. VII, cap. 29. The terms of the by-law, so far as it is necessary to cite them, are as follows :

Section 1. "Les magasins dans la cité de Montréal seront "fermés à sept heures du soir les mercredis et jeudis de chaque "semaine, durant tout le cours de l'année, à l'exception des jours "mentionnés dans les sections 2 et 3, et les dits magasins devront "rester fermés jusqu'à cinq heures du matin le lendemain."

(Here follow provisions excepting the weeks in which there are holidays.)

Sec. 4. "Le mot "magasin" désigne tout établissement ou "lieu où des marchandises sont exposées ou offertes en vente en "détail seulement."

Then follow a number of exceptions relating to shops where particular articles are sold, such as tobacco, fruits, liquors, newspapers, etc.

Sec. 9. "Toute personne qui sera trouvée coupable devant "deux juges de paix d'infraction à quelqu'une des dispositions "du présent règlement sera passible d'une amende n'excédant "pas \$40 pour chaque offense, et, à défaut de paiement, d'un "emprisonnement n'excédant pas deux mois."

“Les poursuites pour infraction au présent règlement seront régies par la partie 58 du code criminel 1892, relative aux convictions sommaires.”

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The statute relied on as the authority for this by-law, 57 Vict., cap. 50, sec. 1, is as follows :

“1. In every city and town, the municipal council may make, amend and repeal by-laws ordering that during the whole or any part of the year, stores of one or more categories in the municipality be closed and remain closed every day or any day of the week after the times and hours fixed and determined for that purpose by the said by-law, but the times and hours so fixed and determined by such by-law shall not be sooner than seven o'clock in the evening nor later than seven o'clock in the morning.”

This statute provided no sanction and was held inoperative on that account. This defect was supplemented by the 4 Ed. VII, cap. 29, which provides the penalty now appearing in the by-law as above cited. The by-law bears date 20th February, 1905.

In March, 1905, the plaintiff attacked the by-law, alleging that they are grocers, having two stores, in one of which they sell also fruits, confectioneries, cigars and liquors, the latter under a grocer's license from the provincial government ; then setting up the by-law in full. The plaintiffs then give the following reasons for the nullity of the by-law.

1. Because the enabling Act 57 Vict., cap. 50, was *ultra vires* of the Provincial Legislature, as an infringement of federal power to legislate concerning trade and commerce.

Because the 4 Ed. VII, providing the penalty is accessory to the first act and also *ultra vires*.

Because the by-law in question is not authorized by said acts.

Because the said by-law is an infringement of individual liberty and freedom of trade.

Because the by-law is unjust, oppressive and partial.

Because the by-law violates the rights acquired by the plaintiff under their license to sell liquors and makes the plaintiff's position worse.

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The answer of the defendant denies the soundness of the plaintiff's legal propositions and asserts the validity of the by-law. Proof was made and it was established that the plaintiff's trade was considerably damaged by the operation of the by-law to the profit of neighboring traders who sold only fruits, confectionery, tobacco, or liquors. It was also established that the sole motive of the legislation and of the by-law was a movement on the part of the merchants' clerks to have a certain number of evenings per week free.

Apart from the statute above mentioned, it was contended that municipalities exercise under common law a wide jurisdiction known as the police power, and, in the case of the city of Montreal, that power is specially conferred by its charter, section 140. We are to inquire then whether this by-law is justified as an exercise of police power under common law or under section 140 of the charter. Whether 57 Vict., cap. 50 is *ultra vires* of the Quebec Legislature.

Whether if the statute be valid it is sufficient to justify the by-law.

Taking up first the question of whether the by-law could be justified as an exercise of police power, 4 Blackstone, Com. p. 162 gives the following definition of that power :

"The due regulation of the domestic order of the kingdom, whereby the inhabitants of the state, like members of a wellgoverned family, are bound to conform their general behavior to the rules of propriety good neighborhood and good manners and to be decent, industrious and inoffensive in their respective stations."

United States precedents are particularly valuable in a question of this nature, as the division of legislative power in that country is similar to our own. Cooley, on Constitutional Limitations, at p. 829, says :

"The police of the state in a comprehensive sense, embraces its whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent off-fences against the state, but also to establish, for the intercourse of citizens with citizens, those rules of good manners

“ and good neighborhood which are calculated to prevent a
 “ conflict of rights and to insure to each the uninterrupted
 “ enjoyment of his own, so far as is reasonably consistent
 “ with a like enjoyment of rights by others.”

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BROWN, J., in *Lawton v. Steele* (1) says : “ It is generally
 “ conceded to include everything essential to the public
 “ safety, health and morals and to justify the destruction or
 “ abatement by summary proceedings of whatever may be
 “ regarded as a public nuisance. Under this power it has
 “ been held that the state may order the destruction of a
 “ house falling into decay or otherwise endangering the lives
 “ of the passers-by ; the demolition of such as are in the path
 “ of a conflagration ; the slaughter of diseased cattle ; the
 “ prohibition of wooden buildings in cities ; the regulation of
 “ railways and other means of public conveyance ; inter-
 “ ments in burial grounds ; the restriction of objectionable
 “ trades to certain localities ; the compulsory vaccination of
 “ children ; the confinements of the insane or of others afflict-
 “ ed with contagious disease ; the restraint of vagrants, beg-
 “ gars and habitual drunkards ; the suppression of obscene
 “ publications and houses of ill-fame ; the prohibition of
 “ gambling houses and places where intoxicating liquors are
 “ sold”.

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See Cooley at p. 837 in the note where he cites a judg-
 ment of the Supreme Court on an act aimed at departmental
 stores :

“ ROBINSON, J.—In order to sustain legislation of the char-
 “ acter of the act in question as a police measure, the Courts
 “ must be able to see that its operation to some degree tends
 “ towards the prevention of some offence or manifest evil, or
 “ has for its aim the preservation of the public health, morals,
 “ safety or welfare. If no such object is discernible, but the
 “ mere guise or masquerade of public control under the name
 “ of “ An act to regulate business trade, etc,” is adopted, that
 “ the liberty and property rights of the citizens may be

(1) 152 U. S. 133.

- 1906 "invaded, the Court will strike down the act as unwarranted.
 — " Mere legislative assumption of the right to direct and indi-
 Beauvais *et al* " cate the channel and course into which the private energies
 v. " of the citizen shall flow, or the attempt to abridge or
 The City of " hamper his right to pursue any lawful calling or occupation
 Montreal. " which he may choose without unreasonable regulation or
 — " molestation, has ever been condemned in all free govern-
 Archibald, J. " ments".

It is really unnecessary to say that the by-law now in question proposing as it does to make individuals who sell their own goods, in their own stores, after seven o'clock in the evening, guilty of an offence punishable by imprisonment, is not justified as a police measure. " *Sic utere tuo ut alienum non ledas.* " In that maxim is found the source and measure of police legislation.

We come now to the question whether the enabling act is *ultra vires* of the local legislature. It may be so, either because it does not fall within the limits of powers conferred on the legislature, or because it invades powers given to Parliament by the British North America Act. In considering this question, it is to be assumed that the residuary power is in Parliament, and that a subject of legislation may in some aspects be within parliamentary jurisdiction, and in others may come within the competence of the legislatures. The only paragraphs of section 92 of the British North America Act which enumerates the powers of the legislatures, which could have any application to the present case are :—

8. Municipal institutions in the province.
13. Property and civil rights in the province.
16. Generally all matters of a merely local or private nature in the province.

Of these, No 8 may be at once dismissed as inapplicable. Clearly the act in question has no relation to municipal institutions unless it deals with an exercise of police power which has habitually been confided for execution to municipal agencies. But we have seen above that the act is not justified as an exercise of such power. It is also to be noted that

although the creation and definition of the offence is confided to municipal councils, the punishment is made to fall within the ordinary criminal jurisdiction of the province.

Does it fall within "property and civil rights in the province?" To answer this in the negative, I need do no more than cite the judgment of the Privy Council in *Russell vs The Queen* ⁽¹⁾ (Canada Temperance Act) referred to and approved by the same Court in *Hodge vs The Queen* ⁽²⁾ (Ontario Liquor License Act). The Canada Temperance Act gave power to counties over the whole Dominion by popular vote to prohibit the liquor traffic, and made the violation of the act a criminal offence. Held within the competence of the Dominion Parliament. It having been contended that this legislation was a violation of legislative jurisdiction over property and civil rights, the following remark was made in rendering judgment :—

"Laws of this nature, designed for the promotion of public safety, order or morals and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs, rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada and have direct relation to criminal law, which is one of the enumerated classes of subject assigned exclusively to the Parliament of Canada. ... Few, if any, laws could be made by Parliament for the peace, order, and good government of Canada, which did not in some incidental way affect property and civil rights; and it could not have been intended, when assuring to the province exclusive legislative authority on the subjects of property and civil rights, to exclude the parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must be

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(1) 7 App. C. 823.

(2) 9 App. C. 117.

1906 "determined in order to ascertain the class of subjects to
 Beauvais *et al* "which it really belongs."
 v. The City of Montreal. What, then is the nature of the legislation now before us?
 Archibald, J. We have seen that it is not police legislation in any sense in
 which that expression has been hitherto understood. Yet, it
 is restrictive of liberty, both as to action and to property. It
 was intended to authorize municipal councils to make an ordi-
 nance prohibiting individuals engaged in trade from conti-
 nuing work after seven p. m., thus depriving them of elemen-
 tary constitutional rights, and making them liable to criminal
 punishment in case of disobedience. The motive of the law,
 so far as can be judged from the proof in the cause, was to
 provide leisure for merchant clerks; and for the purpose of
 preventing small stores run by the assistance of the owner
 and his family, from obtaining an advantage, by being open,
 when others were closed, they also are penalized. But is not
 this legislation of a merely local or private nature within the
 province? It is passed only for the province, and, of course,
 does not pretend to affect any other province. To judge of its
 nature we must not take the by-law which has been passed,
 but we should look at it from the point of view of the most
 extravagant legislation which could have been covered by it.
 Any "*magasin*" may be closed at 7 p. m. That word doubt-
 less would include any building where mercantile business
 was carried on, either at wholesale or retail. It would inclu-
 de bakeries and other classes of business, which must keep
 open at night. But that is not all. We must look at the
 statute in view of the nature of the power which it assumes
 to exercise. It is true that it professes to deal only with
magasins; but it assumes to control the hours within which
 business either wholesale or retail can be done in the Provin-
 ce of Quebec. Could not it equally well have included manu-
 factories of every description, sugar refineries, telegraph and
 telephone business, loading and unloading of steamships, rail-
 way business banks, etc? It is not difficult to see how com-
 merce would be affected by legislation of that class, even
 within hours mentioned in the present statute. But if the right

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to fix hours for business exists in the local legislature, it must involve the right to fix any hours it pleases, and thus to destroy commerce. I am not unaware that the right to tax has been often upheld, where the right to prohibit was admitted not to exist, although the right to tax might be carried to such an extent as to be practical prohibition. But in those cases the right to tax was clear and had to be reconciled with the want of right to prohibit. But here the question is : —Is a power to be considered of a merely local or private nature, which is not derived from any express grant, which necessarily affects commerce and might be so used as to destroy it, particularly when it is not founded on any motive of peace, order or good government ? I think not.

I do not desire to be understood as saying that because the exercise of the power to close business premises at certain hours, would affect trade and commerce, that it is therefore inconsistent with the authority of the federal parliament to regulate trade and commerce. Such an opinion would be against authority, as well as against reason. All I do say is that when such a power is not an incident of a power specially conferred on the legislature it is not lightly to be assumed to exist. Thus in *Hodge vs The Queen* (Ontario Liquor License Act) doubtless trade and commerce was incidentally affected yet the Ontario Act was upheld, Their Lordships remarking, (9 App. Cases, p. 131) : "Their Lordships consider that the powers intended to be conveyed by the act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a purely local character for the good government of taverns, etc, licensed for the sale of liquors by retail, and such as are calculated to preserve in the municipality peace and public decency and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce, which belongs to the Dominion Parliament. The legislation seems to come under sec. 8, 15, 16 of section 92."

I am therefore of opinion, that the statute in question, not

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being founded on any specific power of the legislature and affecting trade and commerce as it undoubtedly does, is not to be considered as a matter of merely local or private interest in the province. The above remarks apply with equal force against the act as a trespass on sub-sec. 27 of sec. 91, B. N. A. Act, giving parliament sole jurisdiction over criminal law and procedure. In the passage above cited from the judgment of the Privy Council in the case of *Russell vs The Queen*, Their Lordships said that the provision of the Scott Act, imposing fine and imprisonment (similar to those in the present case) for violation of that act, was an exercise of power specially bestowed on parliament by the above mentioned section. It is not doubted that the legislature may sanction its legislation by the imposition of fine and imprisonment. But can it go beyond the specified limits of its jurisdiction, and declare an act to be a criminal offence which was before perfectly legal and right, and maintain its right to do so on the ground that its operation was limited to the Province of Quebec ? I am of opinion that the act in question was not within the competence of the legislature.

Now, supposing it was within the competence of the legislature, does it authorize the by-law which has been founded on it ? We have already seen that the by-law must stand or fall with the statute. The statute purports to give power to pass a by-law for the closing of one or several categories of stores. (*Une ou plusieurs catégories.*) Clearly this language is not a grant of power to close all stores. If it be said that the legislature intended to give power to close all, if the municipal council in any case thought advisable, it can only be replied that it has not used language fitted to convey that meaning, and I am not at liberty to turn words from their ordinary sense to arrive at a conclusion which I may fancy the legislature probably intended. If then, it did not mean that all should be closed ; if it did not, for example, mean that a wholesale dealer who goes in the evening with a country buyer who is leaving by a late train and sell him a bill of goods, may be sent to jail for two months as a criminal, how is it to

be determined what it did mean ? Who can say what the "one or several categories" referred to ? Was it to dry goods stores, groceries, hardware stores; to stores on one street as against those on another ; to stores kept by Jews, or Syrians, or Chinese ? Would there not be rather a disposition to infer that the legislature meant to refer to classes of business, ordinarily subject to police supervision ? In any event, the legislature has not pointed out any particular classes of business, which shall be subject to the act, and clearly, if the council is to be restrained within the authority conferred by the statute, it has no authority at all and its by-law is void.

But it is said that the statute was a delegation of authority to the council, to legislate to the matter. Even this cannot be maintained, because the legislature did not intend all and has not indicated which. The Court cannot determine whether the legislature intended to include the classes of stores or all of them which the by-law strikes. Clearly, however, the legislature has not legislated in the sense of the by-law. If the by-law is valid it is as legislation of the municipal council, under delegated authority from the legislature. Much has been said of late as to the power of a legislature to delegate its powers by legislation. I find an article in Lefroy on legislative power in Canada, in which the right of the legislature to delegate power is very broadly asserted as flowing out of the decision of the Privy Council in *Hodge vs The Queen*. The proposition, however, which heads the article (No 63), is much narrower in its scope, and is in accordance with the judgment of the Privy Council in that case :—

" 63. Within the limits of subjects mentioned in section 92 of the B. N. A. Act, provincial legislatures are supreme, and have the same authority as the Imperial Parliament, or the Parliament of the Dominion would have, under like circumstances, to confide to a municipal constitution or body of its own creation, authority to make by-laws or regulations as to subjects specified in the enactment, and with the object of carrying the enactment into effect." It is possible that some remarks of the Judges in rendering judgment may be inter-

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puted as giving to the legislature a general power of delegating its functions to another body ; but the Privy Council has over and over again said that the language of the members of the Court must be interpreted with reference to the case in hand, and cannot be extended to cover a case resting on different facts.

The same question had previously been before the Privy Council in *The Queen vs Burah* ⁽¹⁾. The question in that case concerned a statute which authorized the Lieutenant-Governor to decide whether certain legislation should or should not be extended over certain territory, and also when it should come into operation. This was attacked as a delegation of legislative power, and that view had prevailed with the lower Court. Their Lordships, in reversing, said :—

“But their Lordships are of opinion that the doctrine of the “majority of the Court is erroneous, and it rests upon a mistaken view of the powers of the Indian Legislature. The “Indian Legislature has powers expressly limited by the act “of the Imperial Parliament which created it and it can, of “course, do nothing beyond the limits which circumscribe “these powers. But when acting within those limits, it is not “in any sense an agent or delegate of the Imperial Parliament “but has, and was intended to have plenary powers of legislation as large and of same nature as those of Parliament itself “(precisely identical with what the same Court said of our “legislature in *Hodge vs The Queen*.) Their Lordships agree that the Governor-General-in-Council (the Indian “Legislature) could not by any form of enactment create in “India and arm with general legislative authority a new legislative power, not created or authorized by the Council’s “Act. Nothing of that kind has, in Their Lordships’ opinion, “been done or attempted in the present case. What has been “done is this : the Governor-General-in-Council has determined, in the due and ordinary course of legislation, to remove “a particular district from the jurisdiction of the ordinary

(1) 3 App. C. 903.

“Courts and offices and to place it under new Courts and offices to be appointed by and responsible to the Lieutenant-Governor of Bengal; leaving it to the Lieutenant-Governor to say at what time that change shall take place, and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force by proper legislative authority in the other territories subject to his government.”

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“Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of “the Governor-General-in-Council.”

The effect of these two decisions is that it is not a delegation of legislative power, when laws have been enacted, to leave the details of the administration of those laws and the organization of the machinery for the purpose to a municipal body, and that it is competent for a legislature to pass a law to come into force conditionally, depending upon the action of a body or person authorized to exercise discretion.

But how different the present case ! Our legislature never determined that it was expedient that all or any business premises should be closed at certain hours of the day. If the statute means anything, it means that the municipal councils shall take into consideration whether it is necessary to have a law at all, and if they decide in the affirmative, they may pass a by-law and organize its execution. Whence will come the efficacy of that law ? Not from legislature clearly. It has never determined anything, about it. It is purely and simply the municipal councils which have been invited to set about making criminal law. No authority has held that the legislature can do that, and I am of opinion that it cannot.

Supposing for one moment that the by-law could be founded on sec. 140 of the charter as a police regulation, it has al-

1906 ways been held that Courts can exercise a reasonable supervision over municipal action. I admit that a Court in this country has no right to question the wisdom or justice of a clear legislative action, but that does not fully apply to municipal action which is largely administrative. The Courts in England, much more frequently in the United States, and often in Canada, have set aside municipal ordinances as unreasonable and unjust.

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A consideration of the proof in this cause leaves no doubt that there was no just ground or reason for the passing of the by-law ; that it was a totally unwarranted interference with individual liberty ; that it was unjust and oppressive in its operation ; that, as was said by the U. S. Supreme Court ROBINSON, J., in a case above referred to, there being no object for the preservation of public health, morals, safety or welfare discernible in it, but only an interference with individual liberty under the guise of regulating business, it is one which the Courts will strike down as unwarranted.

Statute declared *ultra vires* ; by-law quashed, and defendant pays costs.

Bisaillon & Brossard, for the plaintiff.

Ethier & Archambault, for the defendant.

COURT OF REVIEW.

MONTREAL, October 31st 1906.

Present :—SIR MELBOURNE M. TAIT, Chief Justice, LORANGER
AND HUTCHINSON, JJ.

THE J. N. ASHDOWN HARDWARE CO. LTD
v. DILLON ET AL

*Contracts—Supply of goods—Assignment—Conditions—
Commission on goods rejected.*

HELD :—The assignee of a contract for the supply of goods who undertakes

to carry it out and to pay a commission to the assignor, is liable for commission on goods rejected as not being of the quality required by the contract.

SIR M. M. TAIT, C. J. :—

The defendants complain of a judgment by which they were condemned to pay the plaintiff, the sum of \$4,602.30 with interest and costs.

The facts of the case are very simple. The plaintiff entered into a contract with the City of Winnipeg for the supply of a certain amount of cement, but arranged with the defendants, that they were to supply the goods and that it was to receive a commission of 5c. a barrel. Some 12 500 barrels of cement were furnished by the defendants, who drew drafts against the shipments which were paid by the plaintiff. One of the conditions of the contract was that the cement was subject to certain tests, as the city engineer of Winnipeg might consider necessary, and that his decision as to whether the same was satisfactory, should be final and binding between the parties.

As a matter of fact, the city engineer, owing to the inferior quality of certain of the cement furnished, deducted 9% of the purchase price amounting to \$1,243.30, which sum forms part of the plaintiff's present demand and was accorded it by the judgment. The balance of the demand is a sum of \$4,360.00 being the value of 41,900 sacks which were used in sending the cement to Winnipeg. The arrangement between the plaintiff and the defendants was that the plaintiff should pay for the sacks, as part of the invoice, and should be credited for their value, upon their return to the defendants. At the close of this transaction, the only dispute remaining was the plaintiff's claim for these two sums. The defence of the defendants to the claim for the \$1,243.30, while admitting the plaintiff's contract with the City of Winnipeg, denied that they were bound by the arbitrary decision of the engineer, whose tests they say were utterly unreliable.

The defence to the other part of the plaintiff's demand was

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that they were only indebted for 18,795 sacks received on the 12th of March 1904.

And to any amount that might owe, they pleaded compensation to the extent of \$3,250.00, price and value of 1,000 barrels of "Atlas" cement, shipped to the plaintiff by the "Atlas Portland Cement Co.", at the request of the defendants.

At the trial, the defendants moved to be allowed to add to their plea certain facts which they claimed had been proved in evidence, and which justified them in setting off, against any claim the plaintiff might have, a further sum of \$1,000., being the difference of 5c per barrel on 20,000 barrels supplied by them to the plaintiff, in execution of its contract with the City of Winnipeg ; the said goods having been charged to the plaintiff, in error, at \$2.85 per barrel, instead of \$2.90, and a further sum of \$150.80, being an amount paid by the defendants to the "Canadian Pacific Railway Co." for freight on empty cement bags from Montreal to Northampton ; the plaintiff having in error shipped the bags to Montreal, instead of Northampton as agreed.

The Court of first instance rejected this motion and also the plea of compensation and gave judgment for the plaintiff for the full amount demanded.

We are unanimously of opinion that this judgment is well founded. We do not think it is open to the defendants to contest the decision of the engineer. The defendants were aware of the terms of the contract, and were as much bound by it as the plaintiff, and the contract clearly sets forth that the decision of the engineer as to whether the cement is satisfactory shall be final and binding between all parties.

In paragraph six of their declaration, the plaintiff alleges that the cement was to be subject to the inspection of the city engineer, whose approval and satisfaction therewith was to be expressed in writing, as a condition precedent to payment therefor, and the defendants admit by their plea the truth of this allegation ; moreover the defendants have not established that the tests were unreliable. With regard to the sacks, we think it is clearly proved that the plaintiff

returned the number he claims for, and is entitled to the amount demanded therefor. We also agree with the learned judge, in thinking that the plea of compensation is not made out, and that the motion to amend was properly dismissed.

The judgment is therefore confirmed with costs of this Court.

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Smith, Markey & Skinner, for the plaintiff.

McGibbon, Casgrain, Mitchell & Surveyer, for the defendants.

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MONTREAL, October 31st 1906.

Present :—SIR MELBOURNE M. TAIT, Chief Justice, TASCHEREAU AND PAGNUELO, JJ.

KENT ET AL. V. BROSSEAU.

Obligations—Payment—Imputation of payments — Payments on account or in part satisfaction.

HELD :—The debtor who owes two or more debts to the same person, may pay in full any one of them he chooses and so extinguish it, but he cannot compel his creditor to impute on any one of them specially, a payment that is only a part satisfaction of it. The ordinary rules as to the imputation of payments take effect in such a case.

SIR M. M. TAIT, C. J. :—

This action is based upon a promissory note of date 4th of October, 1904, for \$500.00, signed by Messrs Larose and Labelle and endorsed by the defendant, and protested for non-payment on the 7th of June 1905.

\$12.50 is claimed for interest and \$2.62 for cost of protest making altogether \$515.12.

The defendant pleaded payment in part and compensation

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in part, the payment was by two cheques for \$100.00 each, signed Joseph Larose, one of the members of the above firm, dated on the 7th of June, 1905.

The compensation pleaded is alleged to be made up of \$60. which the plaintiffs drew as a dividend on their claim against the insolvent estate of Larose and Labelle, of which claim the note in question formed part ; and of the sum of \$497.82, dividend due the defendant by the plaintiffs as curators of the estate of Larose and Labelle, against which the defendant filed a claim for \$2,489.14.

The plaintiffs filed an inscription in law to the effect that compensation cannot operate, if one of the parties is creditor of the other personally, and debtor in a different quality, they must be mutually debtors and creditors. The plaintiffs answered to the merits of the plea by alleging that the firm of Larose and Labelle owed them several notes for considerable amounts, which were long over due on the 7th of June when the note in question matured, and that the \$200.00 paid on that date were imputed on these old notes, that being the oldest debt, with the knowledge and consent of said firm ; that moreover, the note sued upon was not exigible on the 6th of June.

The plaintiffs admit the drawing of the \$60.00 dividend, but deny the compensation set up by the sum of \$497.82. They say the defendant filed a claim in their hands as curators, amounting to \$2,489.14, but that the claim contained no details except that it was for notes, but he refused to produce the notes although requested to do so. or to make any proof of his claim, which was never even sworn to ; the plaintiffs further say that they have nothing either personally or as transferees in their hands belonging to the defendant.

The judgment maintained the plaintiffs' pretensions, condemning the defendant to pay \$515.12 with interest and costs.

This judgment was rendered on the 24th of March 1906, and on the same day, the plaintiffs filed a retraits signed in due form by which they desisted from a portion of the judgment, to wit, to the extent of the sum of \$87.50 with interest thereon from the maturity of said note, 7th of June, 1905.

The defendant inscribed in Review and the only question raised by him, is that the judgment should have allowed credit on the note in question for the \$200.00 paid on the 7th of June, 1905. He contends that it is established by the testimony of Joseph Larose, one of the signers of the note sued on, that the two cheques of \$100.00 each were given in part payment of that note, that he ordered them to be so imputed and that the evidence of Larose is to be preferred to that of Mr Regis Vinet, one of the principal clerks of the office, who testifies that he received the two cheques from Mr Larose and that he credited them on an old note No 346, the proof showing that there were several old notes in the hands of the plaintiffs overdue, on which Larose and Labelle were responsible. Mr Vinet testifies that Mr Larose did not mention at the time he handed in the cheques what note they were to be credited upon. He (witness) admits in effect that after he had received the cheques, and had made the entries by which they were credited upon the old note No 346, that Larose asked him if he had credited the cheques on the overdue notes, to which Vinet replied : "Of course" ; and that thereupon Larose *prit un air piteux*, stating that he thought they might be credited on the note in question.

As a matter of fact, the cheques were credited on the old notes and we can see no good reason to say the first Court was wrong in accepting Mr Vinet's testimony but even if there was any doubt on this point, and even supposing that Larose had stated that the cheques were to go on account of the note in question ; the point remains to be decided : had he a right to have them so imputed ? I think not, for this was only a partial payment.

When a debtor owes several debts and pays in enough money to discharge one of them in full, he has a right to say which one he pays. (1158 C. C.) ; but a debtor cannot compel his creditor to receive payment of his debt in parts, even if the debt be divisible (1149 C. C.). If therefore Larose had paid him the full amount of the note sued upon with interest, he could have insisted on withdrawing it, but as his

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firm was responsible for several notes which were overdue, and as he was only paying \$200.00 on account, he could not insist on this payment being imputed on the note sued upon. (5 Mignault, page 575, 17 Laurent, No 602 ; 5 Démolombe, Con. No 31).

The judgment will therefore be confirmed with costs subject to the retraxit of which acte is granted.

C. Laurendeau, K. C., for the plaintiffs.
Brosseau & Holt, for the defendant.

SUPERIOR COURT.

BEDFORD, November, 1906.

Present :—DOHERTY, J.

AUGER v. THE CORPORATION OF THE COUNTY OF BROME.

Interpretation of Statutes—Powers and liabilities of municipal corporations — Assignment to new municipal corporations of rights and liabilities of corporations abolished—Enactments to meet case of change in division of municipalities—Municipal by-laws—Formalities — Approval by Governor General — Evidence—Onus of proof—Assignment of recourse.

HELD :—10. Where a county municipality took stock and became a shareholder in a Railway Company under a by-law that provided for effecting a loan to pay for the stock, under the 16th Vict. chapters CXXXVIII and CCXIII, and ceased to exist by operation of the 18th Vict. cap. C., and its property, debts, contracts, liabilities, powers and duties were vested in and laid upon a new county municipality created by the same statute, with a proviso that the new municipality should have a recourse to recover "from any other county within the "limits of which any part of the municipality ceasing to exist "was situate, a share of any sum paid in discharge of any such "a debt proportionate to the population of such part of such municipality as compared with the whole population thereof", this

proviso does not apply to monies paid by the new municipality on account of the shares held by it in consequence of the subscription made by the old municipality as stated above. Hence, the township of Brome and the east part of Farnham forming part of the county of Shefford until the 1st of July 1855, and having from that date, under 18th Vict. cap. C., become part of the county of Brome, the latter did not become liable to the new county of Shefford created by the same statute on that date, for any proportion of monies paid by it in carrying out a subscription of the former county of Shefford for stock in a railway company, made by a by-law of the 22nd September 1853.

20. A by-law passed under the 16th Vict. cap. CCXIII which did not provide for a special rate to meet interest and a sinking fund was nevertheless valid if approved by the Governor General, under 18th Vict. cap. XIII, ss. 5 and 6, and is no longer open to attack on the ground of the omissions and informalities in question.

30. Credit given by the government in the accounts of the Receiver General to a county for a sum as due to it under the 22 Vict. cap. XLVII s. 21 and cap. XV, s. 5, is not of itself evidence that it was retained in discharge of a *debt* under the proviso above cited of 18th Vict. cap. C. s. 37, s. 5. The *onus* of proof that the credit and entry thereof is connected with such a debt is on the party alleging it.

40. The recourse given by the proviso is against *the county* in which the part of the county ceasing to exist is situate, and not against the townships or local municipalities forming such part. An assignment of the recourse purporting to be against the townships or local municipalities is therefore void under the statute and gives no right of action against the county in which they lie.

DOHERTY, J. :—

Previous to 1853, the County of Shefford included the townships of Brome and Farnham (9 Geo. IV, c. 73, s. 1).

By the Act 16th Vict. c. 152—assented to on the 14th June 1853, but which came into force on the 23rd of June, 1854—(date at which the parliament which enacted it was dissolved) the township of Brome and the east part of Farnham became part of the east riding of the county of Missisquoi. The provisions of this act were, however, enacted merely for the purpose of elections of members of the assembly, and were not to affect divisions then existing for purposes of municipal or local affairs (Sect. IX).

By 18th Vict. c. 76, ss. 13 and 14, the east riding of Missisquoi, became the county of Browne, being constituted a separate electoral county under that name.

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By 18th Vict. c. 100, each of the counties defined or created for electoral purposes by the two last above mentioned acts, was constituted a municipal corporation (Sect. 7 and 10). This act came into force on the 1st July, 1855. From that date the township of Bromê, and the east part of Farnham, ceased to form part of the municipal county of Shefford.

On the 12th September, 1853, the municipal council of the county of Shefford, (then including the townships of Brome, and the east part of Farnham) passed a by-law authorizing the Mayor, or any other person to be appointed by the council for that purpose, to subscribe, in the name of the municipality, to the capital stock of the Stanstead, Shefford and Chambly Railroad Company, and take shares in it to the amount of \$100,000, and to borrow the money necessary to pay for the said shares, or any part thereof as required, and issue bonds or debentures therefor. The by-law made no provision for a special tax to provide interest and sinking fund. There is no proof when stock was subscribed for under this by-law, nor any direct evidence of the subscription, but the proceedings of the council at its meeting of the 11th September, 1854, show that the stock had then been subscribed, and debentures for \$20,000 issued.

Extracts from the books of the railway company show the county to be charged with subscription of 1000 shares, on the 10th of March, 1854, and credited with a payment of the first instalment of £2,500 on the 12th May, a second instalment of £2,500 on September 9th of same year, and a third instalment of a like sum on the 1st of August 1855, and fourth and fifth instalments amounting to £5,000 in 1857.

An extract from the register of debentures of the county preserved among its archives, shows twenty-five debentures of £100 each in favor of the Stanstead, Shefford and Chambly Railroad Company to have been dated on the 12th May, 1854, twenty-five for a like sum on the 24th of July, 1854, twenty-five for a like sum on the 25th of September 1854, and one for £17,500 on the 28th June, 1855.

An entry in the margin of the page of the register where-

in the debentures of date September 25th, 1854, and that of 28th June, 1855, are entered, states "Debentures on this page "sent to the Receiver General of the province by the Mayor "30th June, 1855." It was agreed by the parties at the hearing that this entry covered all the debentures for the entire £25,000 and that all were sent as therein stated. It is thus established that the debentures by the by-law were executed and sent to the Receiver General, while the townships of Brome and the east part of the township of Farnham still formed, for municipal purposes, part of the county of Shefford.

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It should be added that on the 12th March 1855, the council of the county passed a resolution authorizing and requiring the Mayor forthwith to obtain the approval of the Governor General to said by-law (22), and as soon as it should be approved, to issue and deposit with the Receiver General, according to law, *all* the debentures authorized to be issued by said by-law, and that on the 5th May, 1855, the by-law (No 22) was approved by the Governor General, the Solicitor General reporting that "it appears to him to have been passed in conformity with the provisions of the act 16th Vict. caps. 138 and 213, and that he sees no legal objection of (sic) "Your Excellency's approving of the same, to enable the "Receiver General to issue provincial debentures in exchange "for those of the municipality of the county of Shefford to "the above mentioned amount, under the provisions of the "act 18 Vict. cap. "3" (13?).

By the foregoing it appears that on the 1st July, 1855, on which date the township of Brome, and the east part of Farnham ceased to form part of the municipal county of Shefford, that county had passed the by-law above mentioned, subscribing for stock thereunder, and authorizing its submission to the Governor General for approval, and upon that approval the issue and deposit with the Receiver General of all the debentures by it authorized to be issued, that the by-law had been approved by the Governor General, and debentures for \$100,000 executed under it and deposited with the Receiver General of Canada.

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At this date certificates of the Comptroller General of Provincial Revenue, produced by the plaintiff, show that \$20,000 had been borrowed, or in any case charged as having been borrowed by the county from the municipal loan fund, namely, one sum of \$10,000, charged as borrowed on the 26th March, 1855 and another like sum on the 13th May, 1855. This corresponds in amount with the debentures reported at the meeting of 11th December, 1854, to have been issued previous to that date, and with the credits given the county by the railroad company, on the 12th May, 1894, and the 9th September, 1854.

On the 9th September, 1857, the council of the county of Shefford passed a resolution authorizing the warden and the Secretary-Treasurer to pay the calls then due to the Stanstead, Shefford and Chambly RR. Co., on the stock subscribed by the county.

On the 30th October, 1857, it authorized the warden and Secretary-Treasurer to draw from the Receiver General "the balance of the debentures voted by *this Council* in aid of the construction of the S. S. & C. RR., and to deposit the same in the City Bank of Montreal, subject to the order of the Secretary-Treasurer of *this Council*," and authorizing the Secretary-Treasurer to employ the Hon. L. T. Drummond to draw said debentures on behalf of this Council." These debentures (for an aggregate sum of \$70,000) were drawn by the Hon. L. T. Drummond from the Receiver General on the 30th November, 1857, and the loan of that sum is charged by the Government against the county on the 1st December of that year.

On the 26th of February, 1858, the council passed resolutions to pay the *sixth* call of the stock subscribed to the RR. Co., as soon as it shall become due, and empowering and requiring the Secretary-Treasurer to pay the full amount of the balance unpaid of the stock in advance as soon as called for by the company.

On the 21st September, 1860, it passed a resolution authorizing and requiring the warden to take immediate steps to

procure from the S. S. & C. RR. Co., certificates of the paid-up stock *subscribed by this municipality* to the capital stock of said railroad,

On the 28th of February, 1861, a certificate in favor of the holder of it, and bearing that date was issued by the S. S. & C. RR. Co. to the county of Shefford for one thousand paid-up shares of £25. each of the company's stock.

The stock was held by the county of Shefford up to the 30th December 1887, when it was handed over by it to the Government of the Province of Quebec, as one of the considerations of the discharge by that government granted to the county of the latter's indebtedness to the Municipal loan fund.

At the time of this settlement between it and the government, the government claimed that the county was indebted to it in the sum of \$215,000, being for \$100,000 obtained from the municipal loan fund to pay for the shares aforesaid as well as another \$115,000 received from said fund in connection with a subscription of stock in said road by the county in 1859, and interest on said sums for twelve years under 43-44 Vict. c. 13, less \$93,708.92, credited as paid prior to 1880. By this settlement the county also discharged the government from a claim of \$23,708.92, described as due to the county on account of the Seigniorial indemnity fund, being the amount the government had credited on the loan.

Having effected this settlement, the county of Shefford, on the 22nd February 1888, transferred to the plaintiff all claims demands, title and interests, shares and portions which it "has, may or might have demand or pretend, for the past, "present or future, against the corporation of the township of "Brome, and the township of Farnham, as incorporated and "existing when forming part of the then corporation of the "county of Shefford on the 23rd of September, 1853, and "against the municipal corporations now existing in said two "townships of Brome, Farnham, for their respective proportions of the costs, outlays and expenses incurred, and consideration given and money paid in connection with the settlement of the municipal loan fund, debt, either in capital or

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" interest, if any, in connection with, and relative to said by-law No 22, " and subrogated the plaintiff in all the rights and privileges which it held against the said several municipal corporations of the townships of Brome and Farnham.

No mention is made in the transfer of any claim or right against the county of Brome, the present defendant.

As *cessionnaire* under this transfer, the plaintiff claims from the defendant, the county of Brome, the sum of \$9,908.69. He rests this claim upon the contention that the indebtedness arising out of the subscription of stock in the S. S. & C. RR. Co., and to the municipal loan fund for the \$100,000 paid for the subscription of stock under said by-law 22, was a debt of the county of Shefford as it existed up to the 1st of July 1855, including the townships of Brome and the east part of Farnham that the county having, on the 1st of July, 1855, under the operation of the municipal and road act, ceased to exist, its debts became under that act, the debts of the county of Shefford as it has since existed — it being the part of the original county wherein was situated Waterloo, the place where the meetings of county council had been held, but subject to recourse in favor of the county as since existing, against the county wherein are situate the two townships, namely, the county of Brome, the defendant — for a portion of such debts when paid by the county, bearing the same proportion to the total amount so paid, as the population of the townships bore to the total population of the original county of Shefford, as established by the census of 1851 — that the population of the townships was $\frac{3747}{16437}$ of the total population of the county — that of the \$93,708.92, amount of the claim surrendered by the county as aforesaid, \$43,585.54 went in discharge of the \$100,000 borrowed from the municipal loan fund and paid out under by-law No 22 — that in consequence he, as being in the rights of the county of Shefford he is entitled to recover from the defendant $\frac{3747}{16437}$ of the sum of \$43,585.54, to wit, \$9,908.69.

The demand is met by nine pleas.

The first denies *seriatim* the plaintiff's allegations.

The second attacks by-law 22 as being *ultra vires* and ra-

dically null, because it imposed no special rate or assessment to meet interest on the sum to be borrowed under it, and provides no sinking fund.

The third sets up that no debentures were issued under the by-law, and if debentures were issued upon the municipal loan fund, they were received by persons other than the county of Shefford, without any right to charge the county therewith, and no indebtedness was created against the county by reason thereof.

The fourth is that the government of the province well knowing that no indebtedness on account of the municipal loan fund existed in its favor against the county of Shefford, and the illegality and injustice of its pretended claims to recover any portion of the municipal loan fund, has relinquished its claim against nearly all the municipalities of this province and treating Shefford like the others, of its own free will, relinquished its pretended claim against it, and gave it gratuitously a full discharge; that the shares of the stock in the S. S. & C. RR. Co., were valueless, and the government was indebted to the county in no sum for Seigniorial indemnity and that it cost the county nothing to settle this claim.

The fifth is that at the time of the transfer to the plaintiff, he was a member of the county council of Shefford, and the alleged transfer to him is in consequence null.

The sixth is that the pretended rights acquired by the plaintiff as alleged, were so acquired against the townships of Brome and Farnham, and not against the defendant, and that there is no *lien de droit* between the plaintiff and the defendant.

The seventh is that the alleged transfer to the plaintiff was purely gratuitous and a donation of a right which, if it existed, was not transferable, and which donation the county council was without power to make.

The eighth is that any acquisition by the plaintiff under the transfer alleged, was an acquisition of litigious rights, and that in consequence all he could in any case recover was the price he paid, interest and incidental expenses, and the defendant is entitled to be discharged if the plaintiff should es-

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tablish any claim and that he paid any sum to the said county, by paying the plaintiff such sum with interest and incidental expenses.

The ninth and last plea is that the County of Shefford, after the townships of Brome and east Farnham had been detached from it, retained in its possession the stock it is alleged to have acquired in the S. S. & C. RR. Co., and treated the same as its own property, and never pretended that the townships were in any way interested in it, or indebted to the Province of Quebec with respect to the municipal loan fund; that the county negotiated the alleged settlement without consulting the defendant or the townships, and without intimating to the government any responsibility on the defendant's part and without notice to the defendant or the townships, and delivered over the stock in the company as its own property, and thereby waived all rights and claims against the defendant and the townships against whom it could not pretend any claim without first tendering the defendant its share of the railway stock; that the government of the province never transferred any rights it had against the defendant, and that the county of Shefford, and the plaintiff never had any such rights.

I have set out in detail the different acts with respect to the subscription of shares in the railway company, the issue of debentures to pay therefor, and the obtaining of loans from the municipal loan fund of the county of Shefford, as it existed prior to the 1st July, 1855 (which for convenience may be called the old county), and those of the municipal county as created by the municipal and road act (18 Vict. c. 100), in connection with the subscriptions, debentures and loans, which for a like reason we will call the new county. I have so set them out as I find them evidenced by the documents in the record. It has seemed to me well to do this, inasmuch as the very first question that calls for determination is : was the debt which the new county of Shefford settled with the Government of the Province of Quebec a debt of the old county ? The plaintiff's whole case rests on the

affirmation that it was, and that affirmation is denied by the defendant in its first plea.

The debt so settled was owing to the government for loans to the county on account of the municipal loan fund. The total amount loaned in connection with the transaction with which we are concerned was \$100,000.

The first thing that strikes one in proceeding to examine whether this loan gave rise to a debt on the part of the old county, is the fact that that old county has ceased to exist, before the government actually made any advance to anyone on account of the loan. By the receipt produced by the plaintiff as his exhibit No 10, it appears that all the debentures upon the municipal loan fund issued by the government, and by delivery whereof the loan in question was made, were delivered on the 3rd August 1855 (\$30,000) and on the 30th November, 1857 (\$70,000). The old county ceased to exist on the 1st of July 1855. Delivery of these debentures was therefor certainly not made to it. It was dead. Nor to its agents or attorneys. It could have none. Dead men may have executors who in a certain sense are their agents or attorneys, but dead corporations cannot be so represented.

From this, it is clear that no part of the advance or loan made by the government was effectively carried out by delivery of the debentures representing the loaned money to the old county. It received directly at all events absolutely nothing of what the government loaned. It is true that it appears by the statement of the comptroller produced by the plaintiff as his exhibit No 4, that two sums of \$10,000 were charged by the government as advanced on this loan during the existence of the old county, one as advanced in March, one in May 1855. But the plaintiff, while he produces this statement, which at most but shows what the government charged, produces also the receipts given by the persons who received the debentures delivered in execution of the loan, and these, as has been said, show all the government debentures to have been delivered after the old county had ceased to exist.

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Now, there was no indebtedness by anyone to the government on account of this loan, till the government had actually loaned something, and it actually loaned nothing till after the old county had ceased to exist. It seems difficult under these circumstances to see how the old county can have been indebted to the government for this loan.

It is true that the by-law on which this loan was made was the by-law of the old county. It is also true that the debentures executed under this by-law and deposited with the Receiver General as the condition precedent to the making of the loan, were the debentures of the old county, deposited by it for the purpose of obtaining a loan. But these facts only establish that the old county had complied with all the requirements of the law to that end, and was entitled to have a loan. They do not alter the fact that before getting the loan it was entitled to, it ceased to exist, and as a consequence never got it. Not having got the loan, it could not have owed for it.

Now, not only the old county not being in existence could not have received any of the debentures issued by the government as aforesaid, but as regards \$70,000 of these debentures, it is clearly established that the government delivered them directly to the new county on the 30th November 1857, more than two years after the old county had ceased to exist. These were delivered to the Hon. L. T. Drummond, specially authorized by resolution of the county council of the new county to draw them for it, and deposit them in the bank subject to the order of its Secretary-Treasurer. He signed the receipts he gave for them "p. pro. Sec-Treas. Mun. Shefford and p. pro. Sec-Treas. Mun. Co. Shefford." This loan was unmistakably made to the new county.

As regards the debentures for \$30,000 delivered on the 5th August, 1855, twenty-five of them are receipted for by "W. H. Hopper, Atty." The signer does not say for whom he was attorney. But a note of the comptroller of provincial revenue who certifies the copies of the receipt produced by the plaintiff as proving delivery of the debentures, and which therefor as against him at all events, proves its contents, informs

by the official register of these debentures it appears

that of the forty-two debentures covered by this receipt, but twenty-five were issued "for the county of Shefford", the others "having been received by Mr Hopper as attorney for the county of Stanstead". In the absence of anything to indicate that Mr Hopper acted for anyone else, the inference is that as regards the twenty-five issued for the county of Shefford, Mr Hopper received them as attorney for that county. If so, it was as attorney for the new county—the old county was non-existent, and could have no attorney. A second twenty-five debentures are by a second receipt on the same day, receipted for by the same "W. H. Hopper, Atty." These receipts are produced by the plaintiff and certified by the comptroller general as receipts for the county of Shefford loan of £25,000. The inference as regards whose attorney Mr Hopper was, is the same as regards this receipt as the previous one. Two other receipts, one for sixteen and one for nine debentures bearing the same date are signed by "A. B. Foster, Atty." For whom he was attorney does not appear. All the other debentures being delivered to persons acting as attorneys for the new county, it seems to me the inference is that he was likewise acting as such attorney for it. In any case he was not acting for the non-existent county. He may have been for the RR. Co. If so, I do not see that the company's receiving these debentures could operate to make of their delivery a loan to an extinct corporation, generating a debt on its part to the government. In any event, if there could be, or were any facts or circumstances which could make it so operate, it was for the plaintiff to establish them, and he has not done so.

So far as the loan from the government is concerned, the old county, though it had done everything required to entitle it to such a loan, died without having obtained it. It could not therefore be indebted to the government on account of such a loan. The new county which, so far as appears, received the entire advances or loans made by the government, (and which as a matter of absolute certainty, received at least seven tenths of them) was alone the debtor of that loan. What would appear to have happened is that the old county, having com-

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plied with all the requirements of the law to entitle it to a loan, the government, after that county had ceased to exist, made the loan to the new county, without apparently paying any attention or attaching any importance to the fact that the county whose council had passed the by-law, no longer existed, and treating the existing county as being the same county. It could not by so acting, make the old county its debtor of a loan actually made to the new.

Unless, therefore, the fact that the proceeds of these loans amounting in all to \$100,000 made after the old county had ceased to exist, to wit : the government debentures, were obtained and used for the purpose of paying calls on the shares which the old county had under the by-law subscribed and taken in the stock of the railroad company, would have the effect of making the loan an indebtedness of the old county as being an indebtedness actually incurred by the new, but for the purpose of paying a debt of the old county, I do not see that anything finally paid by the new county in settlement of the loan, was paid in discharge of a debt of the old county. If I am right in this view, then the question whether the plaintiff has the recourse he seeks by this action to exercise, (assuming him to be able to make good as against the defendant's pleas all his other allegations), resolves itself into the question whether the liability to pay calls on the shares the old county had subscribed for and taken in the RR. Company's Stock was a debt, payment in discharge whereof would, under the provisions of section 37, ss. 5 of the Act 18 Vict. c. 100, the section on which the claim made rests, entitle the new county of Shefford to a recourse against the county defendant as being the county including in its limits the townships of the old, not contained in the new county, for a proportion of what it paid, determined in accordance with said section. To put it more briefly, in paying the calls, did the new county pay a debt of the old county, within the meaning of the word "debt" as used in that section of the Act.

No doubt by subscribing to the shares the old county incurred obligations. It became liable to pay to the company

the amount of the shares as it might be called for. But on the other hand, it acquired rights—the shares subscribed for. It became—and this may be called the substantial effect of the subscription and allotment—a shareholder in the company. The subscription and allotment of shares was in effect a contract whereby the county became what may be styled a limited partner in the railway enterprise (for a shareholder in a limited liability corporation is substantially a limited partner in the company's undertaking). having on the one hand the obligations, and on the other the rights of such a partner or part owner as defined by the charter of the company. Its result was not merely to create a debt on the part of the county to the railway company. It was to generate reciprocal rights and obligations on the part of both.

This being so, can it be supposed that the legislator in making a provision that the debts of the old county should become the debts of the new, subject to a recourse by the latter against the county wherein would be situate any part of the old county not included in the new, for the proportion chargeable to such part, intended to treat the obligations of the old county under such a contract as something entirely separate from its rights, and to impose an obligation on the county containing such separated portions of the old county in favor of the new to pay a proportion of the liabilities arising, or which might arise from that contract, while giving to the county so subjected to such obligation absolutely no claim to any share in the rights resulting from it ?

To so suppose would be to attribute to the legislator an intention to perpetrate a manifest injustice. Of course, if the terms of the section show that he intended his disposition to so operate, it is not for the Court to criticize, but to apply that disposition. But if those terms admit of an interpretation excluding such an intention, it seems clearly the Court's duty to adopt that interpretation.

Now, the section in question deals, not only with the debts of the old county, but with its contracts and agreements. It makes all three the debts, contracts and agreements of the new. But for moneys paid in discharge of debts, it alone

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creates a recourse in favor of the new county. It creates no such recourse or indemnity for fulfilment of the obligations where the same do not constitute debts pure and simple of the old county arising out of its contracts and agreements which have become those of the new,—nor does it reserve to the separated portions of the old county, nor to the county made liable in favor of the new county to its recourse for the proportion of the *debts* of the old, any share whatever in the rights or benefits resulting from such contracts or agreements.

From this it seems clearly to result that the legislator made a distinction between debts pure and simple of the old county, and such obligations on its part as might arise out of contracts or agreements creating in its favor rights as well as generating on its part obligations. As regards the former the new county, taking the liability and receiving no corresponding asset, recourse is very justly reserved to it, for the share therein of the territories which were part of the old and are not part of the new county. As regards the contracts, and agreements as yet unexecuted, they are simply transferred over absolutely to the new county, made its contracts, enforceable, by, as well as against, it, and, as it takes all the rights under them, no recourse is given it as regards the obligations, the legislator apparently considered that it might be fairly and justly assumed that in the exclusive enjoyment of the right resulting from such contracts the new county would find the equivalent of the obligations it would, by virtue of them, be called upon to fulfil. Now, it has, I think, been made clear—if indeed it required to be made so—that in subscribing for the shares in question, the old county had not merely contracted a debt. It had entered into a contract creating reciprocal rights and obligations. And that contract, with the rights belonging to and obligations incumbent upon the old county, became, under the statute, the contract of the new county—and this without recourse on its part in the event of such contract proving, as it apparently had, disadvantageous and without liability to share profits with its dismembered parts or the county containing them, should the contract prove profitable.

There seems to me nothing unreasonable, in attaching this significance to the fact that while the legislature, by one and the same section, made the debts, contracts and agreements of the old county, the debts, contracts and agreements of the new, it reserved to the new county a recourse where it paid debts, and remained absolutely silent as to any recourse where it carried out obligations under contracts which did not purely and simply create debts, or whose effects had not been reduced to pure and simple debts resulting from them, at the time of the separation, by the county's having previously received the full benefit of all rights derivable by it under them.

If, on the other hand, we assume that the legislator, in reserving to the new county a recourse in cases where it paid *debts* of the old county, intended to include in the term *debts* all the obligations and liabilities which resulted or might result from contracts or agreements of the old county, which were still to be carried out or in progress of being carried out at the time of the creation of the new county, then we are forced to the conclusion that so far as this section of the statute governs them, and it is the only section which mentions contracts or agreements, all rights thereunder are to belong exclusively to the new county, and the separated portions of the old county, or the county containing such separated portions, to share only in the liabilities arising from them, or, in other words, to read the disposition that the contracts are to be contracts of the new county as though entered into by it, as meaning that they are to be such absolutely, so far as rights are concerned, but that, as regards obligations under them, the new county is to be secured, for part at least, by a recourse against the county into which have passed all portions of the old county not included in the new.

And that no share in the rights under, or benefits to be derived from, the contracts of the old county is to enure to the portions of it that do not form part of the new, necessarily results from the fact that no reserve of any such share is made in their favor in this disposition which makes those contracts the contracts of the new county and enforceable by and from it alone.

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But not only does this absence of any reserve make it clear that the legislature did not contemplate that any share in, rights under or benefits to be derived from such contract was to belong to the portions of the old county which did not form part of the new, but the disposition made by the same act (sect. 37, ss. 4) of the property of the old county, leads necessarily to the same conclusion. For if we should, as the plaintiff would have us treat the word *debts* as used in this section, as covering all the obligations resulting from the contracts therein referred to, then each contract can no longer be treated as a whole, but the obligations under it being classed among the debts, the rights it conferred must be included in the assets, or property of the old county. And we must, in order to ascertain to whom the rights under the contract are to belong, turn to the above mentioned sub-section 4 of section 37 which provides that all the property movable and immovable of the old county is to become the property of the new county, the county, in which are situate the portion of the old county not included in the new, being entitled merely to receive from the new county the value of the shares of these portions in such property.

Now, if we divide the contracts into obligations or debts on the one hand, and rights or property on the other, which we must do if we are to treat the obligations under the unexecuted contracts as debts, then the result would be that in the case of every unexecuted contract, where the old county had stipulated obligations of any kind on the part of the party with whom it had contracted, and itself undertaken obligations in favor of such party, where the fulfilment of these reciprocal obligations might extend over a long term of years and where these obligations themselves or their extent, or the manner of their fulfilment might be dependent upon conditions which might or might not be fulfilled, a valuation would have to be made of the obligations of the other contracting party to the county, and a portion of that value paid to the county containing the portions of the old county not included in the new, which county so containing such portions would thereafter have no interest or share in the benefits to be derived

from the contract, but would nevertheless remain indefinitely liable to recourse against it by the new county, every time the latter fulfilled an obligation incumbent on it under such contract. It seems to me inconceivable that the legislator can have intended to create this position. What he said does not certainly make it unmistakably clear that he so intended. And it would take the most unmistakable declaration of such an intention to make me believe he did. Let us suppose for instance that instead of contracting under a by-law to subscribe for shares, the old county had contracted for the construction of a building, agreeing to pay as the work progressed, and that at this stage the old county gave place to the new, is it conceivable that it would be contended that as the new county which would get the building, made payments under the contract, it would be entitled to a recourse for a share of each payment against the county containing its cut off parts, or that if it borrowed money to make these payments, and subsequently the building being, say, partially destroyed or otherwise diminished in value, it handed over the building and paid a sum of money in settlement of the loan, it would have such recourse for a share of the money so paid, and that in the meantime the county subject to such recourse, would have been entitled to a share in the value of the projected building ?

This, to my mind, absolutely impossible result of treating the rights under unexecuted contracts as included in the word property and obligations under them in the word debts, as used in the act, leads me to the conclusion that to so interpret the dispositions made by the legislator would be to attribute to him an intention which he never had. I see no reason why these dispositions should be interpreted in any different way than would be the dispositions of an agreement between a partner going out of a partnership and the new firm to be composed of the remaining partners of the old. If under these circumstances the parties should agree that :

10. The property movable and immovable of the old firm shall be the property of the new, subject to an obligation on its part to pay the outgoing partner (or some other firm into

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which he was entering), his share of the value of such property.

20. That the debts, contracts and agreements of the old firm should be the debts, contracts and agreements of the new, subject to a recourse where it paid such debts for the share therein of the outgoing partner against him, (or the other firm he was entering), would anyone for a moment contend that the effect of such an agreement was to make the firm which the outgoing partner was joining, a sharer in all the obligations of the contracts of the old firm taken over by the new, and entitled to have the rights thereunder or possible advantages to be derived from them valued and receive a share of such value? I do not think that such an interpretation would even occur to anyone called on to carry out such an agreement. Still less does it seem possible, that such an agreement could be read as making the firm joined by the outgoing partner, subject to a recourse wherever the new firm fulfilled an obligation or made a payment under a contract it had taken over, though entitled to no share in the rights under it or their value.

And the statute here determining the respective positions as regards property, debts and contracts and agreements, of the old county, of the new county on the one hand and the county into which passes under its dispositions the parts of the old county not included in the new, is but doing for the two counties affected what in the supposed case of a partner leaving one firm to join another, the parties to the transaction would by agreement be doing for themselves. The interpretation which would be given to such an agreement made in the terms of the statute, seems to me to be the true interpretation of those dispositions enacted by the legislator.

But even if with regard to contracts in general we could treat the obligations arising under them as something absolutely separate from the rights conferred and as being *debts* within the meaning of the statute and those rights as *property*, can we so separate the two things here? Here the contract is one subscribing or taking shares in a joint stock company. Its entire effect is to make the party subscribing a

shareholder in the company. Under the statute the new county was substituted for the old as the shareholder, and became vested with all the rights or property acquired under the agreement or contract of subscription and allotment, to wit, the shares in the capital stock of the company. The township of Brome and east part of Farnham ceased to have any rights or part in them, to be, in any way or for any part, shareholders. If the shares are to be treated as property of the old county, then any share or interest therein of these outgoing townships—if I may so designate them—was in effect expropriated by the statute. If these shares had a value over and above what remained to be paid for them, then the new county owed the county of Brome a part of that value. If they had no such value, then the shares belonged simply to the new county without compensation. In either case, the new county was their owner, the shareholder, not only because, under sub-section five, the contract of subscription of the shares became its contract, but because, under sub-section four, the shares themselves, looked upon as a property of the old county, became its property. If, at the time this change in ownership of the shares took place, there had actually been paid by the old county anything on the price of these shares, if the old county had for any part fulfilled the obligation of the shareholder, those parts of it which were ousted from any rights in the shares, would appear to have been entitled to be reimbursed their proportion, fixed in the manner determined in the statute, of the amount so paid as representing the value, at the time, of the shares in which they had no longer any interest. If nothing had been so paid, which seems to have been the case, the debentures in the hands of the RR. Co if any there were—being mere promises to pay, then the shares with nothing paid upon them, which became the exclusive property of the new county, may be fairly assumed to have had no value in excess of what had been agreed to be paid for them, which agreement had become the agreement of the new county and enforceable against it alone by the Railway Coy. In any case, the liability to pay for the shares was a liability of the shareholder, as shareholder. The new county,

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becoming, by the operation of the act, the shareholder, became exclusively subject to that liability which was the consequence. The ownership of the shares carried with it that obligation which was inseparable from the quality of shareholder. It is part of the plaintiff's case that the new county, by means of the loan by it obtained from the government and which it has since settled, paid the entire price of those shares. In doing so, it but discharged the obligation incumbent upon it alone, as the only owner of the shares, the only shareholder in the company. It paid no liability of the old county, since the effect of the statute which created the new county, was to substitute it for the old county, as the sole shareholder in the company, and since the liability arising from the subscription was the liability of the shareholder to pay for his shares. The new county moreover was not only entitled to, but received the entire thing acquired by the contract of subscription—the shares in the company—and held and disposed of them as its own. In doing so, it acted quite within its rights. It was, under the statute, the sole owner of the shares, but, being such sole owner of the shares, I entirely fail to see how it can claim, or the plaintiff can claim on its behalf, that in paying the price of those shares, it paid a debt of the old county of Shefford, merely because that old county had, while it existed, subscribed for, that is, contracted to acquire and pay for the shares. The contract became the new county's contract. It received exclusively what the old county had contracted to acquire, and paid the price the old county had undertaken to pay for it. There passed to it, under the statute, the property and the contract of the old county with the rights of the old county under that contract. Those rights were the shares subject to the obligation of paying for them. That obligation was one inseparable from the holding of the shares, from the quality of shareholder. The new county becoming the shareholder, the obligation became its exclusive obligation. When it paid it, it merely fulfilled the shareholder's obligation, that is, its own obligation.

The position is very different from what it would have been had the old county simply undertaken to pay a *bonus*

to the railway company, and the new county borrowed money to pay that *bonus*. There the obligation to pay the *bonus* arising out of the old county's agreement to do so, would have been a debt pure and simple of the old county, and the new county paying it would have had the recourse the plaintiff claims it had in this instance. Here the county had not contracted merely to pay a sum of money. It had contracted to become a shareholder. What, under the statute, was transferred over to the new county was not a debt, it was this contract. This contract imposed obligations, it is true, but merely as correlative to rights resulting from it. It passed in its entirety to the new county.

The rights and obligation, both became the new county's and the law provided no recourse as regards the latter, and no accountability as regards the former.

To resume, at the risk of merely repeating, as I interpret the two sub-sections four and five, they deal with three distinct things, namely, the property of the old county, the debts of the old county, the contracts and agreements of the old county. All three passed to the new. Where property simply passed, the old county became debtor to the county containing the portions of the old county not included in the new, for a part of the value of such property; where debts simply passed it had a recourse against such last mentioned county for a portion of what it paid to discharge such debts; where contracts passed, that is, where the new county was placed in the rights and obligations of the old county, under agreements entered into by it, and not yet executed, the new county took those rights and obligations without liability on its part to, or recourse in its favor against, the county containing the dismembered portions of the old county.

What passed here was the old county's contract to take shares. It has fulfilled the obligations corresponding to the rights under that contract, but it has no recourse. Had the shares it acquired proved of great value, the profit would have been the new county's exclusively. They proved worthless, the new county must bear the loss, and cannot look to the

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defendant, because they proved worthless, to help to pay for them.

The plaintiff has, in my opinion, failed to establish, either that the indebtedness of the county of Shefford to the government, on account of the municipal loan fund, was a debt of the old county, payment whereof entitled the new county to a recourse against the defendant, or that the proceeds of that loan were used to pay such a debt. He has therefore not established that the county of Shefford had any recourse against the defendant for any part of what it may have paid in settlement of its indebtedness to the government on account of that loan. His action in consequence fails. It so fails upon the defendant's first plea whereby it denied *seriatim* the plaintiff's allegations, and among them, those in effect setting up that in making the settlement the new county made, it had made a payment in discharge of the old county,—and this without its being necessary to examine or determine how far the plaintiff had established the other allegations of his declaration, nor how far the other pleas of the defendant are well founded.

I have, however, examined these pleas, and considered the question raised by them. Two of them I would maintain. In view of the conclusion reached, as set forth in what precedes on what I consider the principal question at issue, it was unnecessary for me to adjudicate on these two, or any of the other pleas. I, however, do maintain these two for reasons to be hereinafter stated, and on the others, for the satisfaction of the parties, give the conclusions reached, where I have reached final conclusions on them, as well as my impressions upon those upon which—it not being necessary to decide upon them—I have not come to a definitive conclusion. I deal with these pleas in their order.

On the second plea, I see, in the fact that the by-law 22 contained no provision imposing a special tax, grave reason to doubt its validity, as originally enacted. But assuming it to have been void for want of that provision, my very strong impression—to say nothing more—is that the approval of the

Governor General, under 18 Vict. c. 13, s. VI, made it in the words of the law "valid to all intents and purposes", more especially for the purpose of the loan from the government. Taking his view, the defendant's second plea should be rejected.

The third plea does not seem to me maintainable in face of the proof. Debentures under the by-law appear to have been issued, and municipal loan fund debentures received in exchange by the county of Shefford.

The fourth plea to the effect that the county of Shefford had no claim against the government on account of the Seigniorial indemnity fund, and that it consequently cost the county nothing to settle the debt to the municipal fund is more serious. The only proof of the existence of such a claim on the part of the county is the fact that the government itself credited the county with \$93,708.92 in the statement plaintiff's exhibit No 4. This statement merely credits the sum as "payments" made on the loan, but the plaintiff by his declaration explains that these were not money paid, but an indebtedness of the government for Seigniorial indemnity. The fact of this sum being credited as paid, when it is admitted no payment was made, save by an off-set of the alleged indebtedness seems *prima facie* to establish that the government owed the county. The fact alone that Shefford discharged such a claim would not prove its existence. But this credit being the only proof of the alleged indebtedness, the questions arise to what county, the new or the old, was this credit given, and whether in fixing the amount which he so credited against the indebtedness of the county of Shefford, the Receiver General or whoever, acting for the government, gave the credit, did or did not include therein the shares of the township of Brome and east part of Farnham, in the sum payable as Seigniorial indemnity, which sum was, under the act 22 Vict. (1859) c. 48, to be payable to the municipal loan fund for the benefit of the *township* only, and under 22 Vict. c. 15, to be divided among the *several townships* in Lower Canada, and the town of Sherbrooke. If it

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was the old county of Shefford including within its limits the east part of Farnham and the township of Brome, which was looked to, and treated by the government, as the debtor to the municipal loan fund, and if the debits in the account wherein this sum of \$98,708.92 is credited as paid before 1880, are debits against the old county, it would appear highly probable, indeed there seems to be a presumption amounting to at least *prima facie* proof, that the Receiver General retained in his hands and credited to the county, as against the loan, not merely the amount payable as the shares in the Seigniorial indemnity of the townships constituting the new county of Shefford, but also the shares of those townships which had formed part of the old, though not included in the new county. If he did this, then Brome and east Farnham paid or saw extinguished by compensation their share of the \$93,708.92, for which the county discharged the government, their share of the Seigniorial indemnity being included in it.

The defendant, it is true, does not specially plead this, but, it is incumbent upon the plaintiff claiming reimbursement of what the new county of Shefford paid to settle with the government, and confronted with the defendant's special allegation that it paid nothing, and that it cost it nothing to settle with the government, to establish that it paid something and what. Now, the Seigniorial indemnity was not granted for the benefit of counties, as counties, but of the townships, as townships (22 Vict. c. 48, s. 21-22 Vict. c. 15, s. 5). Under the last mentioned act, it is expressly enacted that the sum payable to the municipal loan fund as Seigniorial indemnity is to be divided among the *several townships*, and provision is made for advances to *each of them*, and payment to *any* such township. It is true that sub-section three of section five, permits the county council of any county, including townships in its limits, to appropriate moneys payable out of the indemnity for any public improvement within the county. But the county council is composed of representatives of the townships comprised in it, and that it was, as representatives of such townships, that the members of such council were empowered

to appropriate such sum, is made clear by the provision in the same section that where a county included seigniories as well as townships, the representatives of townships alone were to be entitled to vote on such appropriation. Moreover this power of appropriation by the county council was to exist for only twelve months after the coming into force of the act 22 Vict. c. 15. After the lapse of that time without action by the county council, the power of appropriation remained in the local councils of the townships, who could appropriate *their share* of the sums. It is not shown that the county council of Shefford ever appropriated to any purpose the amount of the shares of the townships comprised in it, in this indemnity fund. The share of each township remained therefore its own and under its own control.

Moreover the existence of the indebtedness to the municipal fund precluded any such appropriation. By section six of the same act, (22 Vict. c. 15) "So long as any sum of money was payable to the Receiver General by any municipality under the acts aforesaid (the municipal loan fund acts), he might always retain in his hands any sum of money which would otherwise be payable by him to such municipality, crediting the same to it, in his accounts within it under said act".

Now, as has been said, the only proof that the government owed Shefford \$98,708.92 for which the latter discharged it is the fact that in the government account with it, credit is given for this sum. Now, the charges in that account date from the time of the existence of the old county, and no distinction is made between charges made before and those made after the new county came into existence. The debentures moreover originally deposited with the government, that is, those of them with which we are concerned, were—when so deposited—debentures of the old county and deposited by it, and there was no by-law but the old county's by-law, on which a loan could be made. The conclusions furthermore of the commissioners appointed by the government under 43-44 Vict. c. C. c. 14 dealt with the liability to the municipal loan fund as

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sumption that when he retained anything, he retained all that he had a right to, or believed he had right to retain.

Under all these circumstances, I cannot see that the credit given in the statement produced by the plaintiff proved that the amount credited was owing by the government to the new county or the townships comprised in it and not to the old county or the townships composing it. In consequence, the plaintiff has not made it clear that the retention by the government of the amount so credited was so exclusively at the expense of the new county, as to entitle it to treat that retention and a discharge it took upon itself to give of a claim for the entire amount so retained, as giving it the right to exercise a recourse against the defendant as for a payment by it made of a debt of the old county.

To say the least, it remains absolutely uncertain how the sum of \$93,708.92 was made up. It would appear to me it ought to have been easy enough for either party to ascertain and establish this. Neither has done so. It seems to me it was for the plaintiff to show that it was a sum due to the new county, or to the townships comprised in it to the exclusion of the separated townships. As he has not done so, he has not proved that it cost the new county, as such, anything to settle the municipal loan fund debt, or that the townships comprised in it contributed to the so called payment, anything more than their fair proportion with the townships of Brome and east Farnham. On this ground, I maintain the defendant's fourth plea.

As to the fifth plea, I am not prepared to hold the fact that the plaintiff was, at the time of the transfer to him, a county councillor, a cause of absolute nullity of the transfer. Did the fate of the case depend on the solution of this question, I would examine it more fully than I have done.

The sixth plea seems to me clearly well founded, and I have based on it a *considérant* of the formal judgment. The plaintiff, as *cessionnaire* of the county of Shefford of the latter's rights against the townships of Brome and the east part of Farnham, sues the *county* of Brome. If Shefford

had rights against the county of Brome it did not transfer them to the plaintiff, and if it had any such rights or recourse as claimed, arising out of the transaction in question, that right or recourse was against the county of Brome (18 Vict. c. 100 s. 37 ss. 5). No right or recourse whatever was reserved to it, or existed in its favor under this law against, either the township of Brome, or east Farnham, and this act is the source and the only source of the recourse on its part for payments made for liabilities of the old county, which the plaintiff seeks to exercise. The plaintiff therefore, under the transfer invoked, acquired no rights against the county of Brome, because none were transferred to him, and none against the townships of Brome or east Farnham, (if there be ground for contending that rights against these townships would be enforceable by action against the county of Brome), because the county of Shefford had, under the statute relied on, no such rights to transfer him. This plea is maintained.

The seventh plea I would not be disposed to sustain. There seems to have been a valuable consideration for the transfer in the payment of the notary's bill of \$276. Whatever may be said about any claim for the plaintiff's services, and seeing the more than doubtful nature of the rights the county transferred to the plaintiff, it cannot be said that it did not get full value for them in the payment of the notary's bill. Nor do I see that there was anything in the nature of the exceedingly problematical pretended rights transferred, which made them not transferable by the county. The latter, in my opinion as to the pretended rights is correct, made an exceedingly good bargain in getting in exchange for them payment of its notary's bill.

The eighth plea is clearly unfounded. Admitting the rights transferred to be litigious, the only right therefrom resulting to the defendant was to avoid all litigation about them by paying over to the plaintiff what they cost him. Their being litigious rights did not entitle the defendant to first fight out the question of their validity, and then, in the event of the Courts deciding them to be valid, escape any condemnation for

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more than the amount the plaintiff paid for them (C. C. 1584, ss. 4).

The ninth plea does not seem to me better founded. As has been shown whether the new county of Shefford had or had not any recourse for moneys by it paid for the shares in question, those shares were undoubtedly under the municipal and road act (18 Vict. C. 100, sect. 37, ss. 4) its property, and it was within its right in dealing with them as such. And if in paying for them it had paid a debt of the old county (within the meaning of the section cited) then it apparently would have had recourse against the defendant without offering it any part of the shares. Nor, if there existed an indebtedness to the government on account of the municipal loan fund, and that debt was a debt of the old county and became, under the statute, the debt of the new, does it appear that the new county was bound to consult the defendant or the township of Brome or east Farnham, as to its settlement. At most, in any case, the latter might invoke such absence of consultation with them, as entitling them in answer to any attempt to exercise a recourse against them, to show, if they could, either that there was no such debt, or that a more advantageous settlement could have been made of it. This plea therefore would not have saved the defendant had there been paid a debt of the old county by the new, and the plaintiff, under the transfer to him, been vested with the recourse against it of the new county by reason of such payment.

The defendant's first, fourth and sixth pleas are maintained, and the action in consequence dismissed with costs.

F. X. A. Giroux, for the plaintiff.

C. A. Nutting, K. C., Counsel.

McCorkill & McKeown, for the defendant.

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MONTREAL, 10 novembre 1906.

Présents :—SIR MELBOURNE M. TAIT, Juge en chef,
TASCHEREAU & PARADIS, JJ.

BOURDON v. DESLONGCHAMPS.

*Vente immobilière—Garantie contre le trouble d'éviction—
Impôts ou taxes municipales—Taxes générales et taxes
spéciales.*

JUGÉ : —La garantie que le vendeur d'un immeuble doit à son acheteur, en ce qui touche les impôts ou taxes municipales, ne comprend que ce qui est dû ou échu lors de la vente, et ne s'étend pas à ce qui devient exigible après. Cette règle s'applique aussi bien aux taxes spéciales ou extraordinaires, qu'aux taxes générales et ordinaires.

PARADIS, J.—*dissentiente.*

Le jugement inscrit pour Révision et qui est infirmé a été rendu en Cour Supérieure, DUNLOP, J., le 27 janvier 1906, comme suit :

DUNLOP, J. :—

The plaintiff by his declaration in effect alleges that by deed of sale of date the 20th January, 1903, passed before J. S. Lamarche, N. P., he purchased from the defendant an immovable property in the Town of Maisonneuve at length described in the deed ; that it was stipulated that the sale was made with guarantee against all troubles, with the exception of \$2,050.00 and the obligation on the part of the purchaser, the plaintiff, to pay the cost of the deed of sale and all taxes and charges on the property to be computed from the date of the deed of sale ; that the plaintiff has fulfilled all the obligations imposed on him under the deed ; that at

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the date when it was passed there was due the Town of Maisonneuve for taxes and charges previous to the sale, the sum of \$412.41, which sum the defendant refused to discharge and pay though requested, and the plaintiff was compelled, in order to free the property sold, to pay the same to the Town of Maisonneuve, to wit, the sum of \$390.41 and also the sum of \$22.00, which is applied in extinguishment of the balance due on the price of sale.

The plaintiff concludes by demanding that the defendant should be condemned to pay to him the sum of \$390.41 with interest and costs.

The defendant by his plea in effect alleges that he has paid all the taxes and charges on the property in question that he was bound to do ; that at the time of the sale, all the ordinary taxes to 1st May, 1903, to wit, \$11.70, were paid, and the plaintiff owes him on this, his proportion from the 20th January to the 1st of May, 1903, to wit, \$3.05 ; that this sum added to the balance due by the plaintiff under the sale in question forms a total of \$38.05 which the plaintiff owes to the defendant ; that in the event of the plaintiff proving that he has paid any sum for the defendant to the Town of Maisonneuve and that it should be held that the defendant is legally bound to pay, the defendant offers in compensation the amount of \$38.05 *pro tanto* which the plaintiff owes him ; and the defendant by the conclusions of his plea offers this sum in compensation of any sum the plaintiff can establish he has paid for the defendant ; and that the present action be dismissed with costs, reserving his recourse against the plaintiff for the sum of \$38.05 or any of it, in the event of its not being extinguished by compensation.

At the date of the sale, on the 20th January, 1903, there was a charge and privilege on the property sold by the defendant to the plaintiff for the sum of \$412.41 for taxes payable to the Town of Maisonneuve.

It is established that these taxes and assessments, for which the plaintiff by the present action claims reimbursement, had been imposed on the property in question before the passing

of the deed, and that the by-laws, collection and other rolls and proceedings by virtue of which they had been imposed were in full force and effect, being an amount due for drains (égouts) from the 1st October, 1896, and for expropriations, from the 15th April, 1902 ; which assessments were payable in ten annual payments, with interest at six per cent on the balance due, with the right to rate-payers to pay the whole in one payment, interest to be allowed on forborne payments.

The defendant paid all the instalments due before the sale, but, as appears by the account prepared by the secretary-treasurer of the Town of Maisonneuve, the instalments of these taxes payable since the deed of sale, to wit, the sum of \$412.41, have been paid by the plaintiff.

There was a charge or privilege on the land so purchased by the plaintiff from the defendant for the amount of taxes so paid by the plaintiff for the defendant, at and previous to the deed of sale, and consequently a *trouble* or charge on the land against which the defendant guaranteed the plaintiff by the terms of the deed of sale.

The plaintiff in order to free the land from this *trouble* was compelled to pay to the Town of Maisonneuve the sum of \$412.41 as appears by the receipt filed.

The defendant, at the date of the institution of this action, was indebted to the plaintiff in the sum of \$390.41, the total amount of taxes paid by him amounting to \$412.41 as aforesaid, whereof the sum of \$22.00 had been extinguished by a like sum due by the plaintiff to the defendant on the balance of the price of sale.

The plaintiff must therefore have judgment for \$390.41 with interest and costs.

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TASCHEREAU, J. :—

Toutes les contributions publiques et charges locales doivent entrer dans les prévisions de l'acquéreur d'un immeuble et

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sont à ses risques pour l'avenir sans qu'il y ait lieu de distinguer entre les taxes ordinaires ou usuelles d'une municipalité et ses taxes spéciales ou extraordinaires. A cet égard, le vendeur n'a rien à lui déclarer et ne doit le tenir indemne que de tout ce qui peut être *échu* antérieurement à la vente (*Sharpe vs Dick* (1), et jurisprudence y citée ; C. C. art. 1508 ; 8 *Nouveau Dénizart*, p. 774, vo *Franc et quitte* ; 6 *Dictionnaire du Notariat*, p. 221, No 4 ; *Guyot Rép.* vo *garantie*, p. 726, No 6 ; *Pothier*, vo *vente*, Nos 71, 194 ; *Dalloz*, vo *vente*, No 1046) ;

La présente demande est en recouvrement d'une somme payée par le demandeur à la municipalité de Maisonneuve sur une imposition de cette dernière, pour canaux d'égouts et expropriations, frappant l'immeuble acquis par le demandeur du défendeur par l'acte du 20 janvier 1903, (Lamarche, notaire).

La somme ainsi payée par le demandeur n'est devenue due à la municipalité qu'après la date de l'acte de vente.

Aux termes de cet acte, l'acquéreur s'oblige au paiement des taxes municipales et scolaires et des autres impositions à compter du jour de la vente, c'est-à-dire au paiement des versements dont il réclame maintenant le remboursement, lesquels ne sont devenus dûs à la municipalité qu'après le 20 janvier 1903 ; et le défendeur s'est conformé à ses propres obligations en acquittant tous les versements dûs avant la vente, ceux échus depuis étant à la charge du demandeur.

Pour ces motifs, la majorité du tribunal est d'avis qu'il y a erreur dans le jugement de première instance et il est en conséquence infirmé avec dépens.

Angers, De Lorimier & Godin, pour le demandeur.

Bérard & Brodeur, pour le défendeur.

(1) 22 C. S. 52.

SUPERIOR COURT.

MONTREAL, October 27th 1906.

Present :—DUNLOP, J.

LEVIN v. LALANDE ET VIR.

Lease—Rights of lessee—Lease of dwelling previously occupied as a brothel—Failure of lessor to procure peaceable enjoyment of premises leased—Rescission of lease.

HELD :—An action by a lessee will lie to rescind the lease of a dwelling previously occupied as a brothel and in close proximity to two other houses the property of the lessor actually leased and occupied for similar purposes, in consequence of which the lessee and his family are molested, insulted and troubled by frequenters of such resorts, in their enjoyment of the premises leased.

DUNLOP, J. :—

The plaintiff alleges that by lease *sous seing privé*, dated at Montreal. the 14th February, 1905, he leased from the female defendant, for a period of one year from the 1st May, 1905, a certain dwelling house known as number 22 Cadieux street, Montreal, for a rental of \$180 per annum, payable monthly ; that by the lease the defendant bound and obliged herself to give the plaintiff the peaceful possession and enjoyment of the premises ; that in virtue of the lease, the plaintiff took possession of the house on the 1st May, 1905, and has since occupied it with his family ; that the plaintiff is informed and believes that previous to the rental of the house to him it had been used for immoral purposes ; that when he leased it, he was unaware of this fact, and had he known thereof he would not have made the lease ; that furthermore, the premises known as number 18 Cadieux street and 2 St Agathe lane, which are in the immediate neighborhood of the house occupied by the plaintiff, are actually used for immoral purposes ; that the two last mentioned houses are the property of the female defendant, who is responsible for the annoyance

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caused by them ; that by reason of the circumstances alleged, the plaintiff has, by the fault of the defendant, been deprived of the peaceable enjoyment and use of the house rented by him ; that his wife and family have been repeatedly molested and insulted, the windows and shutters of his house broken, and it has become impossible for him to remain in the house ; that he complained to the female defendant and her husband of the state of affairs, and notified them it would be impossible for him to remain in the house ; that some time in the early part of the month of July, 1905, the defendant gave the plaintiff verbal permission to leave the premises, and the plaintiff, relying on this permission, prepared to take advantage of it, and secured another house, but the defendant refused to allow him to leave unless he would pay three months' rent in advance, although the plaintiff had already paid rent in advance up to the 1st August, 1905 ; that the plaintiff has suffered damages through the failure of the defendant to ensure him peaceable enjoyment of the premises, and through her refusal to allow the plaintiff to leave the same after her permission, to do so had been given ; that the lease was cancelled by mutual consent, and that in any event the female defendant has contravened the terms of the lease by her failure to secure to the plaintiff peaceable enjoyment of the house leased to him : that by reason of the premises, the plaintiff is entitled to ask that the lease be declared cancelled and resiliated. The plaintiff reserved his recourse against the female defendant for the loss and annoyance to which he had been subjected, and prays for resiliation of the lease, with costs. Subsequently the judgment was rendered *ex parte* against the defendant on the 28th May, 1906, to which an opposition was filed by the female defendant on 7th June, 1906, which stands as a plea to the present action. After alleging her reasons why her plea to the action was not filed, the female defendant alleges that she leased the tenement mentioned in the declaration to peaceable persons, and not for illegal purposes ; that she is in no manner responsible for the acts of third parties ; that she in no way co-operated with other persons in troubling the plain-

tiff; that the plaintiff has instituted the present action in bad faith, and simply for the purpose of troubling the defendant, and that it ought to be dismissed; and concludes by praying that judgment against her should be annulled to all ends and purposes of law, and the present action dismissed with costs. It is established that the plaintiff leased the premises in question from the female defendant, and that by the lease the female defendant bound and obliged herself to give the plaintiff peaceable possession and enjoyment of them. In virtue of the lease the plaintiff took possession of the house on the 1st May, 1905, and has occupied it with his family. It has been fully established that the plaintiff has, by the fault of the defendant, been deprived of the peaceable use of the house rented by him, and that the plaintiff's wife and family have been repeatedly molested and insulted, and it has become impossible for him to remain in the house. It is established that the female defendant has contravened the terms of the lease by her failure to secure to the plaintiff the peaceable enjoyment of the house leased, and that the plaintiff has been disturbed in his possession thereof, and for which disturbance the female defendant is responsible. The opposition to judgment is rejected, and the plaintiff's action is maintained with costs, and the said lease is resiliated.

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Oughtred, Place & Phelan, for the plaintiff.
J. G. Boissonnault, for the defendant.

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MONTREAL, 31 octobre 1906.

Présents :—TASCHEREAU, LORANGER & PAGNUELO, JJ.

MYLER v. HUOT & HUOT.

Société—Société commerciale—Opérations de bourse—Achat de valeurs pour les revendre à profit—Réclamations réciproques des associés—Courte prescription.

Jugé :—La société formée entre un notaire et un avocat pour opérer à la

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bourse par l'achat de valeurs dans le but de les revendre avec profit, est une société commerciale. Par suite, les réclamations réciproques des associés sont prescrites par cinq années à compter de leur échéance, à savoir, du moment où la société prend fin.

Dunlop, J. Le jugement inscrit en Révision, qui est infirmé, a été rendu en Cour Supérieure, DUNLOP, J., le 28 novembre 1905, comme suit :

DUNLOP, J. :—

Considering that in the year 1882, the defendant and the *tiers-saisi* entered into a transaction on general account for the purchase of certain shares in the Jacques Cartier Bank, in the City of Montreal, and did buy on general account 1847 shares in the said bank, and which said shares, though bought on general account, came into the possession of the *tiers-saisi* in trust, and the defendant paid on said shares, as margin, the sum of \$10,105.29.

Considering that on the 14th of November 1892, the *tiers-saisi* transferred to the defendant one half of said shares, to wit : 924 shares and repaid him one half of the said margin, and hath ever since, though frequently requested, omitted to pay defendant the other half of said margin, to wit, the sum of \$5,052.65, and to pay interest on said margin at the rate of six per cent per annum which he was bound to do and pay under the terms of said purchase, as agreed on by the said *tiers-saisi* and defendant.

Considering that the account rendered on the 29th January 1896 by the *tiers-saisi* defendant concerning the said shares in the Jacques Cartier Bank is not complete, inasmuch as it did not credit defendant with the sum of \$10,105.29, paid by him as margin on the purchase of said shares or with the interest thereon, yet it is acknowledged and hath been acknowledged by the defendant as an account concerning said shares up to the month of November 1892.

Considering that the division of said shares between the *tiers-saisi* and defendant in 1892 constituted a dissolution of the said joint venture and purchase, and that subsequent there-

to each of said parties held one half of said shares, as his own individual property.

Considering that the defendant cannot demand as he now does by his contestation, that the *tiers-saisi* do transfer to him one half of said shares, but that he is entitled to demand from the said *tiers-saisi* the one half of his capital or margin, and interest, or so much of said margin as is still due, and so much of said interest as has not been prescribed appertaining to said 923 shares remaining in the possession of *tiers-saisi* and which right was specially reserved to defendant by the judgment rendered by the Hon. Mr Justice Archibald in a certain case lately pending in the Superior Court, Montreal, wherein the now defendant was plaintiff and the now *tiers-saisi* was defendant, and which judgment is referred to in the answer of the *tiers-saisi* to defendant's contestation in this cause filed whereof a copy has been filed by the said *tiers-saisi* in the present contestation.

Considering that it is established that at the date of the service of the writ of *saisi-arrêt* on the *tiers-saisi* that he was indebted to the defendant in the sum of \$4,827.82, to wit, the balance and remaining due on one half of said capital or margin paid by defendant on said shares and retained by the *tiers-saisi* as aforesaid besides the interest thereon at the rate of six per cent per annum from the eleventh day of January, 1900, to wit, said interest being allowed for a period of five years only, all other arrears of interest being prescribed.

Considering that the defendant hath proved the material allegations of his contestation except as to the amount claimed and the shares demanded, and that the *tiers-saisi* has failed to establish the material averments of his answer to defendant's contestation.

The Court doth adjudge and declare defendant's contestation of the declaration of the *tiers-saisi* well founded, and that at the date of the writ of *saisie-arrêt* on the said *tiers-saisi*, the said *tiers-saisi* was justly indebted to the defendant in the sum of \$4,827.82, balance due defendant on the capital or margin furnished by him as aforesaid, and interest at the rate

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of six per cent per annum on said sum as aforesaid all other arrears of interest being prescribed, said interest amounting to the date of the service of said *saisie-arrêt* to the sum of \$1,448.35 the said two sums amounting together to the sum of \$6,276.17 and which were and are due at the date of said service of said *saisie-arrêt* to defendant.

And doth maintain the said contestation, as respects the said sums and doth dismiss the other conclusions of said contestation, and doth reject the answer of the said *tiers-saisi* to the said contestation, the whole with costs.

And doth order the said *tiers-saisi* to pay to plaintiff within fifteen days after service upon him of the present judgment the said sum of \$6,276.17 to be imputed in deduction and payment of the amount of the judgment rendered in this case in favor of plaintiff against defendant and to the payment of the said sum, the said *tiers-saisi* shall be held and constrained by all legal ways and means and in so doing duly discharged.

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PAGNUELO, J. :—

La demanderesse en vertu d'un jugement rendu en sa faveur contre le défendeur, en a poursuivi l'exécution par voie de saisie-arrêt entre les mains du tiers-saisi. Ce dernier a déclaré ne rien devoir au défendeur qui a contesté sa déclaration. Il s'agit donc au fond de savoir et de décider si le tiers-saisi est le débiteur du défendeur comme celui-ci le prétend. Les faits d'où cette prétention a surgi, dégagés d'accessoires et de circonstances qui sont sans importance quant aux relations des parties entr'elles, se réduisent à ce qui suit.

En 1882, les parties Tancrede Arthur Huot et Lucien Huot, qui sont les deux frères, ont acheté, dans le but de réaliser un profit en les revendant, un but de spéculation, 1847 actions de la Banque Jacques Cartier. Suivant leurs conventions, l'achat ou les achats avaient été faits à terme et moyennant couver-

tures (*on margin*) que Tancrede devait fournir et les ventes devaient être faites par Lucien, qui, seul, avait la tâche de se tenir au courant des oscillations de hausse et de baisse et de faire le coup de la vente au moment opportun. Malheureusement ce moment tarda, les choses traînèrent pendant dix ans et finalement en 1892 les parties firent un partage qui attribua 924 actions à chacun d'eux. Durant l'intervalle de 1882 à 1892 toutes ces actions étaient détenues par le tiers-saisi, pour son bénéfice commun et celui du défendeur ; il retira les dividendes qu'elles produisaient et il est assez probable qu'il dut, de temps à autre, déboursier pour ajouter à la couverture suivant l'intempérie des saisons. Bref, il eut l'administration des valeurs. De là naquit l'obligation d'en rendre compte et une action intentée par le défendeur en 1901 a été jugée et ce jugement a été confirmé en appel ⁽¹⁾.

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Dans sa contestation, le défendeur prétend que le tiers-saisi lui est encore endetté pour un reliquat. Le tiers-saisi plaide prescription et c'est la seule question à décider.

Les avances pour la couverture ne devaient être remboursées qu'au fur et à mesure que les actions seraient vendues. En 1892, les deux associés se sont divisés les 1849 actions qu'ils avaient achetées en 1882. Dès lors, le défendeur n'eut plus à réclamer du tiers-saisi, que les avances de fonds sur les 943 actions qui lui avaient été laissées en partage, mais le droit du défendeur de réclamer cette avance est échu dès ce moment, et la prescription a commencé à courir en même temps. En 1896, le tiers-saisi a rendu un compte des dividendes et de ses dépenses jusqu'en 1892 ; ce compte le laisse reliquataire de \$2,178.00, mais ce compte des dividendes est indépendant de celui des avances de fonds par le défendeur pour la couverture à payer sur l'achat des actions.

En 1901, comme nous l'avons dit, le défendeur a poursuivi le tiers-saisi en reddition de compte pour les actions de la Banque Jacques Cartier, et pour sept actions de la Compagnie de Raffinerie de Sucre St Laurent. La demande en reddition

(1) 14 B. R. 522.

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de compte pour les actions et la Banque Jacques Cartier a été renvoyée, parce que le compte avait déjà été rendu, mais la cour réserva au défendeur son recours au sujet de tel procédé qu'il aviserait pour recouvrer le capital avancé et l'intérêt sur icelui. C'est la demande actuelle.

Le droit de poursuivre est-il éteint par la prescription ? Oui, si la transaction est commerciale, car dans ce cas, il faudrait appliquer la prescription de cinq ans à compter de 1892. Non, s'il s'agit d'une dette non-commerciale.

On a voulu assimiler cette mise de fonds à un prêt, mais cette prétention n'est pas admissible ; c'était la mise du défendeur qui devait être remboursée avec intérêt à l'époque stipulée ou à la dissolution de la société.

L'association en participation ou anonyme établie entre les parties, pour un objet spécial, constituait une société commerciale, quoique les personnes la composant fussent, l'un notaire et l'autre avocat de profession, car son objet était l'achat d'actions dans une banque, dans le but de les revendre avec profit ; c'est une spéculation commerciale, comme s'ils se fussent associés pour acheter et revendre du grain ou du lard. "Les sociétés commerciales, dit l'art. 1863 C. C. sont celles qui sont contractées pour quelque trafic, fabrication, ou autre affaire d'une nature commerciale, soit qu'elle soit générale ou limitée à une branche ou aventure spéciale. Toute autre société est civile."

Les opérations de bourse ne constituent pas nécessairement des actes de commerce, mais elles prennent ce caractère si elles font partie d'un ensemble d'opérations ayant en vue la réalisation de bénéfices par l'achat et la revente des valeurs. La jurisprudence française est fixée sur ce point. Ce qu'elle exige, c'est un but de spéculation commerciale qui se déduit principalement de ce que les titres ont été achetés pour être revendus. La preuve de cette intention est, en général, difficile à constater directement, elle se dégage ordinairement d'une succession d'achat et de reventes. Ici, cette intention est clairement marquée dans la correspondance des parties et dans les pièces de la procédure : elle est admise par les deux parties. (Voir la contesta-

tion par le défendeur et la lettre du tiers-saisi, pièce 11). 2049 actions ont été achetées dans l'espace de 4 mois en 1882 par le tiers-saisi pour le compte de la société, dont 1849 ont été divisées entre lui et le défendeur en 1892 ; le défendeur avait fait les avances des couvertures dont il réclame aujourd'hui la moitié du défendeur.

Dans l'espèce de l'arrêt de la Cour de Cassation du 3 juin 1885 (S. 1885, 1,259) il s'agissait de l'achat de cent actions d'une société financière, et de savoir si cet achat avait constitué un acte de commerce, attendu, dit la Cour de Cassation, que d'après les articles 631 et 632 Code de Commerce, les tribunaux de commerce connaissent, entre toutes personnes, des contestations relatives aux actes de commerce, et que la loi réputé acte de commerce, tout achat de marchandise pour les revendre. . . qu'il résulte des déclarations de l'arrêt sagement interprétées, que le dit achat faisait partie d'un ensemble d'opérations. . . qui toutes avaient en vue de réaliser des bénéfices, par l'achat et la revente des valeurs de bourse ; que dès lors en admettant la compétence des tribunaux de commerce pour statuer sur la contestation dont il s'agit dans l'espèce, l'arrêt attaqué a exactement appliqué la loi.—Rejette.

Voir aussi Cass. 23 Janvier 1882 (Picaud)

S. 82, 1, 263—Cass. 4 Juillet 1881 (Rubichon)

S. 82, 1, 15—Lyon, 7 Janvier 1881—S. 81, 2, 25.

Cass. 4 Janvier 1893—8, 98, 1, 214.

Cass. 7 Février 1894—S. 98, 1, 214.

Voir, Rep. gen. de droit fr. par Sirey. Vo Actes de Commerce.

Sirey, Table générale, vo *Société Commerciale*, N.1, 15, 16; 2ème tome Déc. 1 *eod. verbo* N. 1, 3ème T. Déc. N. 1 et s., 10; 4ème T. Déc. N. 13, 19, 8.

La société entre le défendeur et le tiers-saisi pour l'achat et la revente des actions dont il s'agit, dans un but de spéculation, était donc contractée pour faire des transactions commerciales de bourse, et était par sa nature et son objet une société commerciale, au sujet de laquelle toute action est prescrite par cinq ans—(art. 2260, 4o en toutes matières commercia-

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les à compter de l'échéance). L'action du défendeur pour se faire rembourser ses avances était prescrite lors de l'action de 1901, dont le jugement lui a réservé le recours : la réserve de ce recours était seulement de ne pas constituer chose jugée en faveur du jugement qui déboutait le demandeur de sa demande en reddition de compte ; la cour lui réservait de se pourvoir autrement que par une action en reddition de compte, mais n'avait pas l'intention, ni le pouvoir de faire revivre les droits éteints par la prescription ou autrement, ni de lui conférer des droits nouveaux.

Nous croyons donc que la contestation de la déclaration du tiers-saisi devrait être renvoyée avec dépens, et le jugement qui a condamné le tiers-saisi à rembourser les avances avec cinq ans d'intérêt, devrait être infirmé.

Lamothe & Trudel, pour le tiers-saisi.

Bernard & Chalifoux, pour le défendeur contestant.

SUPERIOR COURT.

MONTREAL, October 31st 1906.

Present :— CURRAN, J.

LEMIEUX v. LA COMPAGNIE EQUITABLE D'ASSURANCE CONTRE LE FEU.

Fire insurance—Representation of ownership of property insured—Insurance by husband of property belonging to his wife—Avoidance of insurance for false representation—Insurable interest of husband in property of his wife.

HELD :—A contract of insurance of movables in favour of a husband who represents himself to the insurer as the owner of them, whereas they belong to his wife, is null and void for false representation.

Querre, has the husband, on a true representation of the facts, an insurable interest in the property of his wife on which to found a valid contract of insurance ?

CURRAN, J. :—

The plaintiff alleges, that on the 20th of July, 1903, he took

out a policy of insurance in the office of the company defendant for \$2,000, on certain movable effects, in a building No 2341 St James street, Montreal. These effects consisted in furniture for the household, bar fixtures and stock of a restaurant. That on the 6th of March, 1904, a fire occurred damaging the goods insured. The plaintiff alleges that he duly notified the defendant that his loss amounted to \$1,345, but that the company has refused payment. The defendant pleads, admitting the contract of insurance, denying any regular notification of the fire having occurred, and specially avers : that long previous to the date of the policy, the goods insured were the property of the plaintiff's wife, who is separated from him as to property ; that she acquired the goods under a notarial deed of the 26th of June, 1903, before Mtre Bouchard, notary ; that even she is not freely proprietor thereof, because she shall become so only after having made full payment, the vendor having the right to resume possession and proprietorship of the same, should any payment falling due not be made by her. The defendant further alleges, that the plaintiff violated several of the conditions of the policy and that he has no legal claim against the company.

The plaintiff then made a motion to amend his declaration by alleging, that the deed invoked by the defendant, as having been passed by his wife, was a nullity on account of simulation. He reiterated the allegation that he and not his wife was the real proprietor of the goods damaged by fire, and that they had been bought and paid for with his own money and not the money of his wife. An order allowing the amendment was granted, and the defendant answered, repeating the allegation that the plaintiff was never proprietor of the goods referred to, and that even if he did own a part of the goods damaged, the whole contract between the plaintiff and the defendant was void. The defendant contends, that if the deed passed by the plaintiff's wife was simulated, it was so passed for the purpose of protecting the plaintiff against his creditors, and thus prevent them from levying on his goods for the payment of his debts, and that he cannot

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plead his own turpitude in support of his present pretension. Had the plaintiff taken the position, that, as husband of the lady who owned the greater part of the goods damaged by fire, he had an insurable interest therein, the position of the parties might have been different. The plaintiff, however, persisted in claiming, that the goods were his and founded his claim against the company on the ground, that they had been purchased with his own money, alleging further that the deed passed by his wife was not an honest transaction. Leaving aside the question of pleading his own turpitude, raised by the defendant, the plaintiff has utterly failed to prove that he ever bought or paid for these goods, on the contrary the proof is overwhelming that his wife had paid for them ; that the business was in her name ; that the license had been applied for by her, and had been granted in her name, that counsel for the plaintiff at the argument felt constrained to withdraw that part of the claim, and urged that he should recover for a sum of \$685 value of the goods, not comprised in the deed of sale before Bouchard, notary, and which appear to have been the personal property of the plaintiff. The latter made a false representation and stuck to it, as regards part of the goods insured. Can he recover ? In other words, is the contract divisible ? This question has already been dealt with by the Court of Review in the case of *La Cie d'Assurance Mutuelle & Lemay* ⁽¹⁾ where the report is very elaborate. The latest decision is *Lambert v. La Foncière Cie d'Assurance contre le feu* ⁽²⁾. " This policy although itemized must " be considered as within itself entire and indivisible." When the insured makes a false statement on a material fact, it voids the whole insurance. Under the provisions of the Civil Code and the statute on mutual insurance companies, the plaintiff's action must fail with costs as well as the costs of amendment, which was not sustained by proof.

Cressé & Descurries, for plaintiff.

Beaubien & Lamarche, for defendant.

(1) 12 S. C. 232.

(2) 25 S. C. 169.

COURT OF REVIEW.

MONTREAL, November 10th 1906.

Present :—SIR MELBOURNE M. TAIT, Chief Justice, TASCHEREAU & PARADIS, JJ.

VÉZINA v. BROSSEAU.

Sule—*Sale of stolen chattel—Interpretation of the Code—Meaning of words "dealer trading in similar articles" in art. 1489 C. C.*

HELD.:—The words "a dealer trading in similar articles" in art. 1489 C. C. mean a trader whose ostensible business is to deal in similar articles. Hence a pedler of fruits and vegetables, although he may occasionally buy and sell horses, is not a dealer trading in horses within the meaning of the article.

SIR M. M. TAIT, CH. J.:—

The plaintiff in this case revendicates a horse of which he is proprietor and which was stolen from him on or about the 5th of May last, by a man named Pelletier who was subsequently convicted of the offence.

The horse which cost the plaintiff \$14. was sold by Pelletier to a man named Lefort for \$40.00 and was sold by Lefort to the defendant for \$44.00.

The defendant's defence is based upon article 1489 C. C.

He says he bought in good faith from a trader dealing in similar articles.

That is the whole point in the case, the first Court found that Lefort was not a trader dealing in similar articles within the meaning of the law.

As a matter of fact he was a pedler of fruits and vegetables, and although he may occasionally have sold horses, that was not his real or ostensible business.

We are unanimously of opinion that the judgment is fully sustained by the proof and must be confirmed with costs.

Arthur Lamarche, for plaintiff.

Bisaillon & Brossard, for defendant.

COUR DE RÉVISION.

MONTRÉAL, 10 Novembre 1906.

Présents :—PAGNUELO, PARADIS & LAFONTAINE, JJ.

LEE CHU v. DESLAURIERS.

Interprétation des conventions—Convention synallagmatique—Droits et obligations réciproques considération les un des autres—Louage—Droit du bailleur de retenir additions faites par le preneur—Preuve—Preuve testimoniale dans une matière où la valeur excède \$50.

Jugé :—1o. Une convention entre un bailleur et un preneur que le ail sera continué pendant un nombre d'années, à condition que le preneur construise, à la satisfaction du bailleur, une addition à l'immeuble loué, crée des droits et obligations réciproques qui sont la considération les uns des autres. Par suite, le bailleur refusant de continuer le bail, sous le prétexte que l'addition n'a pas été construite par le preneur à sa satisfaction, ne peut en même temps la retenir sans indemnité. La convention restant inexécutée, les parties retombent sous le droit commun qui ne permet au bailleur de retenir les additions faites par le preneur qu'en en payant la valeur.

2o. Lorsque l'addition qui fait l'objet d'une telle convention est d'une valeur excédant \$50, la preuve testimoniale est inadmissible pour établir qu'elle a été construite à la satisfaction du bailleur.

Le jugement, inscrit en Révision et qui est confirmé, a été rendu en Cour Supérieure, LORANGER, J., le 2 mars 1906. comme suit :—

LORANGER, J. :—

Le demandeur se pourvoit en recouvrement de dommages contre le défendeur, alléguant qu'il est le locataire depuis le 20 octobre 1901 d'une maison appartenant au défendeur, située sur la rue Lagauchetière de cette ville, en vertu d'un bail qui s'est continué d'année en année par tacite réconduction ;

Que le 26 d'octobre 1901, le défendeur s'est engagé à donner au demandeur un bail de sept années à partir du mois de

mai alors prochain (1902), si le demandeur construisait sur la propriété une extension alors en voie de construction à son entière satisfaction ;

Que le demandeur a construit cette extension et le défendeur l'a acceptée ;

Que le défendeur a vendu le 18 mai 1904 le dit immeuble avec l'extension en question, et refuse de lui assurer la possession des prémisses pour le temps à courir jusqu'à l'expiration des sept ans, tel que convenu ;

Que le demandeur a même reçu avis du nouveau propriétaire qu'il aurait à déguerpir le premier mai 1905 et que son bail prendrait fin à cette époque ;

Que le demandeur a été en conséquence obligé de quitter les lieux prématurément et en éprouve des dommages qu'il évalue à la somme de cinq cents piastres, y compris le coût de l'extension qu'il a construite et que le défendeur s'est appropriée.

Le défendeur plaide que le demandeur ne s'est pas conformé à la condition sous laquelle la promesse d'un bail de sept années a été faite ;

Que l'extension devait être construite à l'entière satisfaction du défendeur et sujette à son approbation, ce qui n'a pas été fait ;

Que le défendeur lui en a fait des reproches lorsque la bâtisse a été terminée ;

Que le demandeur sachant qu'il n'avait pas rempli sa part d'obligation, n'a pas dans le temps demandé un bail de sept ans, et, l'aurait-il demandé, qu'il n'avait pas le droit de l'avoir ;

Qu'il est faux que le défendeur ait accepté la dite extension.

Il est admis que le bail en vertu duquel le demandeur a occupé les prémisses mentionnées dans la déclaration, a été continué par tacite réconduction.

La convention intervenue entre les parties est dans les termes suivants : " Montreal, October 26th, 1901. I shall give " Mons. Lee Chu a seven year lease if he makes the exten-

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" sion now going on my property Lagauchetière street, City,
 " at my entire satisfaction and approval".

Cet écrit est signé par le défendeur Geo. Deslauriers.

Le même jour, le demandeur a signé l'écrit suivant : "Any
 "construction or repairs made by me in this house No 574 La-
 "gauchetière shall be the property of the proprietor without
 "claiming any indemnity from the said proprietor."

Il est en preuve que le demandeur a construit et terminé
 l'extension en question dans les quelques mois qui ont suivi
 la convention ci-dessus rapportée, au vu et au su du défendeur.
 l'a habitée depuis jusqu'au moment où il a quitté les prémisses,
 le premier mai 1905.

Le défendeur n'a formulé aucune plainte contre le mode de
 construction au cours de la construction et avant l'action.

Plus tard, il a vendu la bâtisse pour son bénéfice et avantage,
 en a retiré le prix et reçu la valeur.

Le coût de cette extension a été de \$300.00.

La vente de la dite extension faite par le défendeur et
 l'admission contenue à l'acte de vente, qu'elle a été érigée par
 le demandeur, constituent une acceptation de la bâtisse.

Aux termes des écrits ci-dessus mentionnés, le défendeur
 avait la propriété de la dite extension, et le demandeur ne
 peut en répéter le coût ; son seul recours consistant dans les
 dommages résultant de la perte de jouissance durant les trois
 années à courir pour terminer le bail, et la différence dans le
 prix du loyer à venir pour sa nouvelle location.

Le défendeur admet dans son témoignage qu'il n'aurait pas
 consenti le bail de sept ans, eût-il été mis en demeure de le
 faire ; il est en conséquence sans intérêt à se plaindre du dé-
 faut de mise en demeure préalablement à l'action et dans les
 conclusions de la déclaration.

En vendant sa propriété avant l'expiration du bail, sans
 sauvegarder les droits du demandeur, le défendeur a été cause
 de l'éviction prématurée dont ce dernier a souffert.

La différence entre le loyer payé par le demandeur jus-
 qu'au 1er mai 1905 et le prix de location de son nouveau do-
 micile, est de cinq piastres par mois.

Il n'est pas prouvé que la durée du nouveau bail du demandeur soit de plus d'une année.

Le demandeur a en outre droit aux dommages qu'il a éprouvés par la perte des intérêts pendant trois ans sur la somme de \$300.00 qu'il a dépensée pour la construction de la dite extension, dont le défendeur a reçu le prix comme susdit.

Il y a jugement pour le demandeur pour \$105. intérêts et dépens.

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JUGEMENT DE LA COUR DE RÉVISION.

LAFONTAINE, J. :—

Nous sommes arrivés à la conclusion de confirmer le jugement de la Cour Supérieure, mais pour d'autres motifs que ceux invoqués par le demandeur, dans son *factum*, et que ceux mentionnés dans le jugement *a quo*.

En effet, la preuve de l'acceptation par le défendeur des additions ou améliorations faites par le demandeur, à la maison louée par lui, n'est pas suffisante, et en conséquence le droit du demandeur à un bail pour sept années, lequel par la convention, dépendait de la qualité de ses ouvrages et de leur acceptation par le défendeur, n'est pas établi. Car les prétendues déclarations faites par le défendeur de sa satisfaction des ouvrages faits invoquées par le demandeur, sont des aveux qui ne pouvaient pas être prouvés par témoins. Ces déclarations d'ailleurs sont niées par le défendeur, et la qualité des témoins du demandeur qui les rapporte, laisse beaucoup à désirer.

Mais d'un autre côté, si ces additions et améliorations faites à la chose louée n'étant par acceptées et n'étant pas acceptables, n'obligeaient pas le défendeur à donner au demandeur un bail pour sept années, elles restaient au moins la propriété du demandeur. Car le droit de propriété que le défendeur invoque pour conserver ces additions, faites par son locataire, sans avoir rien à payer, il le tire du contrat invoqué par le demandeur, relativement à un bail de sept années. Ce ne sont pas

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là deux contrats différents, mais deux clauses du même contrat imposant des obligations et conférant des droits réciproques. Par conséquent, le défendeur, répudiant le contrat, quant aux obligations qu'il lui impose, ne peut l'invoquer quant aux droits qu'il lui aurait conférés.

En effet, le titre du défendeur à la propriété des additions faites par le demandeur, est la considération fournie par le demandeur pour avoir un bail de sept ans, stipulé par le demandeur et promis par le défendeur avec la condition que les additions faites par le demandeur seraient de bonne qualité et acceptées par le défendeur.

La condition manquant, le demandeur n'acquiert pas le droit à un bail de sept années, mais d'autre part, le défendeur n'acquiert pas le droit à la propriété des additions du demandeur, puisque la convention s'écroule et que le contrat ne se forme, ni pour l'un ni pour l'autre.

A défaut de cette convention devenue caduque ou non-avenue par suite de la non-réalisation de la condition, les parties sont régies par le droit commun tel qu'on le trouve dans l'article 1640 du C. C., c'est-à-dire que le demandeur avait droit d'enlever à l'expiration de son bail, ses additions dont il était resté propriétaire. Le défendeur s'y étant opposé et les ayant même vendues expressément avec la propriété, les a donc retenues, et par conséquent, aux termes de cet article il doit en payer la valeur. Autrement, il s'enrichirait aux dépens d'autrui.

Le demandeur réclame comme domnage la valeur de ses améliorations et aussi le surplus de loyer que son expulsion prématurée le force à payer pour se loger ailleurs, pendant les trois années qui lui restaient à faire pour compléter le terme de sept années. La Cour Supérieure lui a accordé la somme de \$105.00, représentant le surplus de loyer que le demandeur est obligé de payer pour se loger ailleurs, ainsi que l'intérêt sur le coût des constructions faites par le demandeur dont l'usage lui est enlevé et qui est déterminé à \$300.00.

Nous sommes d'opinion que le demandeur a droit à la valeur de ses additions et améliorations, vû qu'il n'a pas eu la

faculté de les enlever et que le défendeur les a retenues. Cette valeur est plus considérable cependant que la somme qui lui est accordée par le jugement *a quo*, le demandeur, toutefois, s'en est contenté, et le jugement doit être confirmé.

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Saint Julien & Théberge, pour le demandeur.

Lamothe & Trudel, pour le défendeur.

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MONTREAL, November 10th, 1906.

Present :—SIR MELBOURNE M. TAIT, Chief Justice,
TASCHEREAU & PARADIS, JJ.

THE ROYAL TRUST COMPANY v. THE GREAT NORTHERN ELEVATOR COMPANY.

*Corporations—Corporate powers—Power to issue bonds—
Purposes for which bonds may be issued—Guarantee or
suretyship of bonds of one company by another—Guarantee
binding when amounting in effect to a payment
of rent.*

Held :—10. A company whose charter provides that it "may acquire, own, lease and sell real estate", and "build, sell, lease and otherwise deal with elevators, etc," and further "may issue bonds bearing interest to an amount not exceeding the cost of any elevator built by it," has the power to issue such bonds for the price of an elevator bought by it.

20. A guarantee of bonds issued by a company for the price of an elevator, given by a Railway Company to which the elevator is leased and amounting in effect to an undertaking to pay the rent to a trustee for the bondholders, is valid and binding and may be enforced against such Railway Company.

SIR M. M. TAIT, C. J. :—

The defendants have inscribed in Review two judgments rendered against them in favour of the plaintiff, one in the case No 1519 and the other in the case No 615.

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The issues in both cases are practically identical and they were joined for the purposes of the trial. The actions are based upon a deed of trust and hypothec, and upon a deed of lease, both dated the sixth of March 1901. The main question at issue is whether these companies had the power and authority to enter into the stipulations contained in these agreements. The first Court was of opinion that they had, and in No 1518, the defendants were jointly and severally condemned to pay the plaintiff \$23,135.60, and the defendant, the Railway Company, was further condemned to pay the plaintiff an additional sum of \$15,752.05 with interest and costs.

In No 615, the defendants were jointly and severally condemned to pay \$10,424.70 and the Railway Company was further condemned to pay an additional sum of \$7,500.00 with interest and costs.

In these notes, I will deal with case No 1518.

By the deed of trust it was in effect provided that the Elevator Company should issue bonds to the extent of \$300,000, and it thereby mortgaged and hypothecated in favour of the plaintiff, as trustee for the purchasers of the bonds, all its property, franchises, and undertakings in the deed described, and more particularly a certain grain elevator belonging to the company and then being operated by it in the City of Quebec.

It was further stipulated that the elevator should be leased to the Railway Company for a yearly rental of \$25,427.70 to be paid by the Elevator Company to the plaintiff, as trustee, for the purpose of providing a sinking fund for the redemption of the bonds when the same should fall due; and further for the purpose of keeping the elevator in repair.

The Elevator Company bound and obliged itself to create and maintain the sinking fund for the payment or purchase of the bonds at their maturity, and to make yearly payments for that purpose, on the 31st of December in each year of \$10,427.70 to the plaintiff, as trustee, the first instalment to be paid on the 31st December 1901, and so on until the maturi-

ty of the bonds ; and it was further provided that in case of any default at any time in the payment of interest on any of the bonds, or in any payment required for the purposes of the sinking fund, or of any default in any of the obligations of the company, and in the event of such default being continued for six months, that it should be lawful for the plaintiff at the request of twenty per cent of the holders of bonds outstanding, to proceed immediately by judicial process to enforce its rights as stipulated in the deed and to protect the rights of the bondholders.

By the deed of lease, the Elevator Company leased to the Railway Company all its property, franchises, and undertakings, as therein described, for twenty years to be counted from the 31st of December 1899, at an annual rental of \$25,427.70 which it bound itself to pay to the plaintiff, as such trustee, semi-annually, before the last days of June and December in each year, during the term of the bonds, which sum should be equal to the amount of interest falling due on them on such dates, or on such part of them as should then be outstanding, to meet the interest, and further, to pay the plaintiff, as such trustee, on the last day of December of each year, while any of the bonds should remain unpaid and outstanding, the sum of \$10,427.70 to be applied by the plaintiff, as trustee, as the sinking fund for the payment of the capital of the bonds ; and it was further agreed that upon the expiration of the lease and upon the completion of the obligations assumed by it, the Railway Company should be the owner of the property and of the undertaking.

In accordance with the terms of the deed of trust, bonds to the extent of \$300,000 were duly issued by the Elevator Company the capital of which it bound itself to pay on the 31st December 1919, with interest at the rate of five per cent per annum, computed half yearly from the 31st day of December 1900, and payable on the last days of June and December in each year during that period, and the payment of them, both as to capital and interest, was, for value received, guaranteed by the Railway Company, such guarantee

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being endorsed on each of the bonds ; it being thereby further stipulated that the Railway Company would comply with the terms of the lease, and would pay to the plaintiff as trustee a sum sufficient to provide a sinking fund for the redemption of the bonds at maturity ; and would guarantee the performance of all the obligations undertaken by the Elevator Company in reference to them. All the bonds were still outstanding and unpaid when this action was instituted. The Elevator Company failing to comply with the conditions of the trust deed, and agreement, did not deposit with the plaintiff, as trustee, a sum sufficient to meet the interest, nor a sum sufficient to carry out its obligations in reference to the sinking fund.

The Railway Company also failed to comply with the conditions of the lease as to its guarantee so endorsed on the bonds and failed to pay the rental stipulated in the lease to the plaintiff as trustee, sufficient to provide for the payment of the interest and failed to pay the plaintiff the annual rental of \$10,427.70 as a sinking fund to provide for the redemption of the bonds at maturity.

By reason of this, the plaintiff claims there was due to it the sums for which judgment was rendered. A further sum of \$1,364.46 was claimed on account of premiums due for insurance on the property, which has since been paid and is no longer in issue.

The only portion of the plea of the Elevator Company on the merits of the case which we have to consider in this Court is the pretension that the company never had any legal power or authority to issue the bonds or to enter into the deed of trust. The Railway Company pleaded that the obligations it assumed by the lease are in no way binding upon it, as it had no legal power or authority to enter into it or to undertake the obligations therein contained, and especially that it had no power or authority to give the guarantee referred to and that, if such guarantee was given, it was wholly illegal, null and void.

The answer to this plea is that the obligation enforceable

against the Railway Company is an obligation to pay rent under the terms of the lease ; that the plaintiff is not endeavouring to enforce the guarantee referred to in the deed of mortgage and endorsed on each of the bonds, and accordingly that the plea of the Railway Company is entirely unfounded.

Now, let us deal with the plea of the Elevator Company that it had no right to issue the bonds for which it has been paid valuable consideration.

The Railway Company by its charter (63 Vict. Dominion chapter 68) had a right to construct, and did construct, the elevator in question in this case, and sold it to the Elevator Company, which, according to its charter (63 Vict., Que., chapter 82), it had a right to acquire.

The Railway Company then leased the elevator from the other company, under the terms already mentioned, and the latter company had a right to make the rental payable to the plaintiff who by the deed was declared to be the creditor who was to receive it. By both deeds, the Elevator Company formally recognizes its obligations towards the plaintiff.

Now, as to the right of the latter company to issue the bonds, section 5 of the Act incorporating the company (63 Vict., Quebec, chapter 82) enacts that it may issue bonds bearing interest to an amount not exceeding the cost of any elevator built by it and may mortgage and hypothecate such elevators, and the revenues and tolls derived therefrom to secure the payment of the bonds so issued and the interest payable thereon.

I understand the argument to be that because the elevator in question was not built by the Elevator Company, but by the Railway Company who sold it to the Elevator Company, that the former company had no authority to issue the bonds.

By section 3 of the Act. the Elevator Company is authorized to acquire, own, lease and sell real estate (*immeubles* according to the french version) necessary or convenient for the purpose of carrying on a general elevator business, and may build, sell, lease or otherwise deal with elevators for the storage of grain and other goods, etc.

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By section 6, the company may lease to any Railway Company, or to any other company or person, any elevators which it may own.

It appears to us that the interpretation which the Elevator Company now seeks to put upon its own charter, is too narrow. The deed of trust recites that the cost of the elevator was \$449,000 being \$149,000 more than the face value of the bonds issued ; and the truth of the recital has not been put in issue. I think there is no reasonable doubt as to the authority of the Elevator Company to issue the bonds or as to its responsibility for them. What I think the statute meant was that the company could issue bonds to cover the cost of any elevator it might require for the purposes of its business. What good reason is there for making a distinction between an elevator built for that kind of business by another or by the company itself ? Indeed, it might be more advantageous for the company to have one built by some other person.

As to the plea of the Railway Company, I think it is equally unfounded. The action of the plaintiff against it is based on the deed of lease by which it undertook to pay in discharge of the Elevator Company to the plaintiff, the annual sum of \$25,427.70.

The endorsement on the bonds is merely a confirmation by the Railway Company of this undertaking, and is in the following terms :

“ By the terms of the lease entered into with the Great Northern Elevator Company, dated the 6th March 1901, the Great Northern Railway Company of Canada has agreed to pay to the Royal Trust Company a sufficient sum to meet the interest of the within bonds and the sinking fund provided to meet the principal thereof, and, for value received, the said Great Northern Railway Company of Canada hereby guarantees to the holders hereof the prompt payment of the principal and interest of this bond according to its terms.”

“ Witness the signature and the seal of the said Great Northern Railway Company of Canada, this day of 1901.”

The present action is not taken by the holders of the bonds, but is taken by the Royal Trust Company, the creditor delegated to receive the payments for the Elevator Company which the Railway Company undertook to make under the deed of lease and purchase above mentioned. The endorsement on the bonds was recited in the plaintiff's declaration merely as a recognition and undertaking by the Railway Company that it would comply with the terms of the deed of lease. This is a sufficient answer to this defence of the company, but we are inclined to go further and say that the Railway Company in giving this guarantee was in effect guaranteeing the payment of its own debt.

It had legally bound itself to pay the amount of money represented by the bonds and the interest thereon. By means of these bonds, both of the defendants who were parties to them have been benefitted and enriched.

The defences they have made to the actions directed against them have not been made out, in the opinion of this Court, and the judgments in both cases are confirmed with costs.

Cook, MacMaster & Brodie, for the plaintiff.

Lafleur, MacDougall & Macfarlane, for the defendants.

COURT OF REVIEW.

MONTREAL, November 10th 1906.

Present :—SIR MELBOURNE M. TAIT, Chief Justice,
TASCHEREAU & PAGNUELO, JJ.

SIMARD v. CHAMPAGNE ET AL.

*Landlord and tenant—Action for rent and saisie-gagerie—
Removal of goods seized to premises owned by third
party—Second suit against such third party.*

HELD :—When movables attached by *saisie-gagerie* in an action for rent by

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the landlord are removed into premises belonging to a third party, a second action will not lie to bring such party into the suit and to preserve the privilege of the plaintiff as against him. It is useless for such purposes and if brought will be dismissed as such.

SIR M. M. TAIT, CH. J. :—

About the 24th of March the plaintiff took proceedings by a *saisie-gagerie* against the defendant who was his tenant, asking for rescission of the lease and \$110.00 for rent due and damages.

The seizure was made at the leased premises 457 Boulevard St Joseph, Ville St Louis, and the effects were placed in the control of a guardian.

While this seizure was pending, that is to say, on the 23rd of April last, the defendant moved all the furniture and effects so seized to the house No 701A Hutchison street, Ville St Louis, which is the property of the *mis-en-cause*.

Thereupon the plaintiff instituted the present action in which he sets forth the foregoing facts, and further alleges that he has a privilege on the effects so seized, not only for the said sum of \$110.00, but also for the costs incurred and to be incurred in the first action as well as in the present one, and that inasmuch as the *mis-en-cause* might claim a privilege on said effects, he is obliged and has an interest to put him in this case in order to have the effects declared pledged by lessor's privilege in his favor, and he prays that the said Félix Routhier be made *mis-en-cause* in the action so previously taken, and that the effects seized therein be declared affected by plaintiff's privilege for the said sum of \$110.00 and costs; and that it be further declared that the *mis-en-cause* cannot acquire any privilege on said effects so long as he has not been paid his claim in capital, interests and costs.

The defendant pleaded to the action that he made a confession of judgment in the first case for \$70.00 and costs of an action as instituted; that the effects so seized in the first case remained seized and subject to the plaintiff's privilege; that he changed his residence with the consent of the plaintiff, that J. P. Beaudoin was named voluntary guardian to said

effects, which are still under his guardianship ; that the *mis-en-cause* was notified by him that the effects were so seized, and that therefore he could not claim any privilege before the plaintiff so long, as the *saisie-gagerie* was in force ; and that the present action is useless and the defendant could not be condemned to pay costs.

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The first Court dismissed the action with costs. We unanimously concur in a dismissal of the action, but we do not quite agree with the reasons enunciated by the first Court.

Article 1623 enacts that in the exercise of the privileged right the lessor may seize the things which are subject to it, upon the premises, or within eight days after they are taken away ; and article 953 C. C. P. enacts he may likewise follow and seize elsewhere, even for amounts not yet due, the movable effects which were in the house or premises leased, when they have removed without his consent ; but he must do so within eight days after their removal.

In our opinion the result of these two articles is that these effects having been seized before they left the leased premises, and being then under the charge of the guardian, the proprietor of the premises to which they were removed could acquire no privilege upon them, which could rank before the plaintiff, and that it was not necessary for the plaintiff to give notice to the *mis-en-cause* of the first seizure, or to serve him with a copy of the *saisie-gagerie* within eight days in order for the plaintiff to preserve his privilege. The effect of the first seizure could not in any way be destroyed or impaired by the removal of the effects which were in the custody of the Court.

For these reasons, we think that this action was absolutely unnecessary and useless, and that it was properly dismissed with costs, and that judgment is confirmed.

J. C. Lamothe, for the plaintiff.

J. A. E. Dion, for the defendant.

COUR SUPÉRIEURE.

ARTHABASKA, 13 novembre 1906.

Présent :—MALOUIN, J.

COTNOIR v. BRISSON.

Enregistrement—Radiation d'un enregistrement nul ou irrégulier—Partie intéressée au sens de l'art. 2149 C. C.

JUGÉ :—1o. Le vendeur d'un immeuble, comme garant de son acheteur, est une partie intéressée au sens de l'art. 2149 C. C. Il a donc qualité pour poursuivre la radiation d'un enregistrement hypothécaire nul ou irrégulier sur l'immeuble vendu.

• 2o. Le défendeur ne peut pas opposer à cette poursuite que l'acte enregistré ne crée pas d'hypothèque ; dès que l'enregistrement existe la partie intéressée a droit à sa radiation.

MALOUIN, J. :—

Le demandeur poursuit la défenderesse en radiation d'hypothèque.

Le 8 février 1905, par acte passé devant le notaire L. A. Brien, le demandeur vendit à Norman Lefebvre l'immeuble No 1113 du cadastre officiel du canton de Grantham, avec garantie de tous troubles.

Le certificat du registrateur du comté de Drummond, où est situé l'immeuble, fait voir que le contrat de mariage passé entre Narcisse Bibeau et Domithilde Brisson, la défenderesse, a été, le 21 mars 1900, enregistré au long sur le dit immeuble. Ce contrat de mariage stipule en faveur de la défenderesse un douaire préfix de \$200.00 et un préciput de \$100.00. Le contrat de mariage contient une description de l'immeuble No 1113 avec la stipulation que toutes les conventions contenues au contrat portent hypothèque. Il est donc certain que l'immeuble No 1113 du cadastre du canton de Grantham paraît être grevé par cette inscription au bureau d'enregistrement d'une somme de \$300.00 en faveur de la défenderesse.

Le demandeur a, le 23 août 1905, intenté la présente action

contre la défenderesse et demande que la dite hypothèque soit rayée.

Les parties s'entendent sur un point ; elles admettent toutes deux que la créance de la défenderesse, mentionnée en son contrat de mariage, est éteinte par confusion.

Mais la défenderesse demande le renvoi de l'action pour les raisons suivantes :

1.—Le demandeur est sans intérêt pour intenter la présente action.

2.—Les conclusions de l'action sont trop vagues.

3.—Le contrat de mariage de la défenderesse ne crée pas d'hypothèque et de plus, il a été enregistré à une date à laquelle Narcisse Bibeau n'était pas propriétaire.

Le demandeur a-t-il un intérêt suffisant pour le justifier de poursuivre ?

L'article 2149 du code civil donne à toute partie intéressée le droit d'intenter l'action en radiation d'hypothèque. Voici comment il se lit : " Si la radiation n'est pas consentie, elle peut être demandée au tribunal compétent par le débiteur, le tiers détenteur, le créancier hypothécaire subséquent, la caution et par toute partie intéressée, avec dommages-intérêts dans le cas où ils peuvent être dûs."

Et l'article 77 C. P. C. édicte qu'un intérêt éventuel est un intérêt suffisant pour justifier une poursuite. Voici ce qu'il dit :

77.—"Pour former une demande en justice, il faut y avoir intérêt. Cet intérêt excepté dans le cas de dispositions contraires, peut n'être qu'éventuel."

Ceci posé, voyons quel est l'intérêt du demandeur.

Le demandeur a vendu l'immeuble en question à Norman Lefebvre le 8 février 1905 pour une somme de \$700.00 payable \$100.00 par année avec garantie de tous troubles. Il lui est encore dû une somme de \$600.00. Le demandeur a intérêt à faire disparaître l'hypothèque, parce que, premièrement : si Lefebvre est troublé, il a un recours contre lui pour le forcer à faire cesser ce trouble ; deuxièmement : quand la balance à lui due ne sera plus que de \$300.00, Lefebvre pourra refuser de la lui payer tant que l'hypothèque ne sera pas rayée.

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Dans la cause de *Drolet & Belleau* ⁽¹⁾, le juge en chef Casault reconnaît que l'inscription hypothécaire est un péril d'éviction qui autorise l'acheteur à retarder le paiement de son achat. Et le juge en chef Dorion, dans la cause de *Parker vs Fulton* ⁽²⁾, parlant au nom de la cour, s'exprime comme suit : "Under art. 1585, a buyer who has just cause to fear
 " that he will be disturbed in his possession by an hypothecary action may delay the payment of the price until the
 " seller causes the disturbance to cease or gives him security.
 " This Court has already decided in the case of *Shuter vs Jobin* ⁽³⁾, that the buyer was not obliged to establish a
 " clear right of action against the property purchased, nor to
 " assume the risk of a law suit. It was sufficient if there appeared a reasonable cause of trouble. Now, it has been repeatedly held in France, that the existence of *inscriptions hypothécaires* was a sufficient cause of trouble to entitle
 " the purchaser to retain the price of sale, and this jurisprudence has always been followed here. Sirey, 1826,3,17 ;
 " Dalloz, 1827,1,252 ; idem, 1827,1,322 ; Dalloz, 1829,2,189 ;
 " Sirey, 1833,2,41 ; 1 Duvergier, Vente, No 425 ; 9 Dalloz, " Rec. Alp. 449."

Ces deux motifs sont suffisants pour justifier la présente poursuite de la part du demandeur. Son intérêt me paraît évident.

Le demandeur a prouvé en outre que Norman Lefebvre l'a mis en demeure de faire rayer l'hypothèque. La défenderesse prétend que cette mise en demeure ne constitue pas un trouble suffisant qui justifie la présente action. Elle soutient que le trouble doit consister en une poursuite judiciaire et elle cite plusieurs décisions pour appuyer son opinion : *Drolet vs Belleau* ⁽⁴⁾, *Talbot vs Béliveau* ⁽⁵⁾, *Beaudette vs Cormier* ⁽⁶⁾

(1) 11 Q. L. R. 190.

(2) 21 L. C. J. 253.

(3) 21 L. C. J. 67.

(4) 11 Q. L. R. 190.

(5) 4 Q. L. R. 104.

(6) 16 Q. L. R. 69.

Elle aurait raison, et les décisions citées auraient de l'actualité, s'il s'agissait d'une poursuite de Lefebvre, l'acheteur, contre Cotnoir, le vendeur. Lefebvre, pour contraindre Cotnoir à faire radier l'hypothèque, serait obligé de prouver qu'il est troublé, de fait. Son action serait basée sur son acte d'achat qui le garantit contre tous troubles seulement. Mais il n'en est pas ainsi dans la présente action ; c'est le garant qui poursuit en radiation d'hypothèque la personne en faveur de qui l'hypothèque est inscrite. Ce n'est pas en vertu d'un contrat qu'il poursuit pour forcer la défenderesse à accomplir l'obligation de garantie contre tous troubles, mais en vertu des articles cités plus haut qui autorisent toute personne intéressée, même d'un intérêt éventuel, à poursuivre. Et par tant rien n'empêche que Cotnoir prenne les devants et fasse disparaître l'obstacle avant qu'il y soit forcé par une poursuite.

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La défenderesse allègue comme second motif à l'encontre de l'action que le contrat de mariage ne crée pas d'hypothèque et que de plus il a été enregistré à une date à laquelle Narcisse Bibeau n'était plus propriétaire.

Il n'est pas nécessaire que je décide dans la présente cause, si l'hypothèque créée par le contrat de mariage de la défenderesse est régulière ou non ; il suffit qu'il soit établi que l'hypothèque est inscrite et qu'elle grève l'immeuble 1113 du cadastre du canton de Grantham pour que la poursuite soit accueillie. Le but de la demande, c'est de faire disparaître l'inscription. Voir Laurent, Vol. 31, No 175.

Le fait que l'inscription aurait été prise après que Narcisse Bibeau eût cessé d'être le propriétaire de l'immeuble, n'est pas non plus une raison qui justifie le renvoi de l'action. Du moment que l'inscription existe en faveur d'une personne, c'est contre cette dernière que l'action en radiation doit être intentée. (Laurent, Vol. 31, No 185).

La défenderesse, comme troisième moyen, soutient que les conclusions de l'action sont trop vagues pour justifier une condamnation.

L'article 113 du C. P. C. dit que : " le tribunal ne peut adju-

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“ ger au-delà des conclusions, mais il peut les restreindre et “ n'en accorder qu'une partie”.

Dans la présente cause, la cour a tous les éléments nécessaires pour restreindre les conclusions à leurs justes limites. Ce moyen est également rejeté.

Mais il a été établi au dossier que depuis l'institution de la présente action, la défenderesse a signé une main levée d'hypothèque qui a été enregistrée ; que les hypothèques dont on demande la radiation n'apparaissent plus au bureau d'enregistrement.

Vu que ces faits apparaissent au dossier et qu'il n'est plus nécessaire d'ordonner la radiation, je ne maintiens l'action que pour les frais.

Perrault & Perrault, pour le demandeur.

Lussier & Gendron, pour la défenderesse.

COUR SUPÉRIEURE.

—ST-HYACINTHE, 24 novembre 1906.

Présent :—DEMERS, J.

LA BANQUE DE ST-HYACINTHE v. DESAULNIERS & MALLETTE.

Procédure—Exécution volontaire des jugements—Dépôt de la quotité saisissable des salaires, etc. (Loi Lacombe).

JUGÉ :—L'article 1147a C. P. C. (*loi Lacombe*) est d'une application générale comme mode d'exécution volontaire des jugements de la Cour Supérieure aussi bien que de ceux de la Cour de Circuit. Cf. *Larochelle v. Laroc & Cie du Pacifique*, 27 C. S. 434.

DEMERS, J. :—

Il s'agit en cette cause de l'interprétation de la loi Lacombe, 3 Ed. VII, chap. 57, intitulée. “Loi amendant le code de procédure civile relativement à la saisie des salaires et des gages.”

Cette loi empêche-t-elle le créancier qui a obtenu jugement

en Cour Supérieure de saisir-arrêter les gages ou salaires de son débiteur qui s'est prévalu de l'art. 1147*u*.

La négative a été soutenue dans la cause de Larochelle & Lavoie, 25 R. O. C. S., l'affirmative dans la cause de Godin & Flanagan, 7 R. de Prat. p. 6.

En faveur de la première proposition on dit : Cette loi se trouve au titre de la Cour de Circuit non appellable ; cette règle de la Cour de Circuit ne s'applique pas aux procédures de la Cour Supérieure.

Nous croyons qu'il faut tenir pour l'affirmation pour les raisons suivantes :

1o. La Cour Supérieure ne suit pas la procédure de la Cour de Circuit ; mais les procédures qui sont adoptées dans cette dernière cour peuvent affecter celles de la Cour Supérieure. Par exemple, une première saisie-arrêt en Cour de Circuit est préférée à une subséquente en Cour Supérieure.

2o. La loi ne distingue pas ; aucune saisie-arrêt, dit-elle, ne sera émise.

3o. Il s'agit d'une loi remédiatrice ; il faut donc l'interpréter libéralement. Le greffier de la Cour de Circuit est constitué séquestre de la partie saisissable des gages de l'employé. Il reçoit ce dépôt en faveur de tous les créanciers. Le dépôt fait entre ses mains a pour objet d'empêcher une saisie.

4o. L'article 599 C. P. C. déclare que les quatre cinquièmes d'un salaire qui n'excède pas trois piastres par jour sont insaisissables. Le cinquième du salaire du défendeur étant séquestré entre les mains du greffier de la Cour de Circuit, la demanderesse ne saurait en saisir un autre cinquième.

On objecte que le défendeur n'a pas donné avis de ce dépôt à la demanderesse. Cette objection ne touche pas le fond du litige, elle le réduit à une question de frais. Personne ne doit être puni sans qu'il y ait faute de sa part. Le défendeur était tenu, avant de contester, de donner avis au demandeur. Il n'aura ses frais qu'à compter de sa contestation.

E. V. Fontaine, C. R., pour le demandeur.

J. O. Marceau, pour le défendeur.

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COUR DE RÉVISION.

QUÉBEC, 30 novembre 1906.

Présents :—LANGEJER, A. J. C., LEMIEUX & McCORKILL, JJ.

DUPONT v. CLOUTIER,

Interprétation des conventions—Prorogation d'un délai de réméré—Lettre missive.

JUGÉ :—L'acheteur d'un immeuble sous la condition du droit de réméré par le vendeur dans un délai de six ans, qui en laisse la possession à ce vendeur moyennant une rente annuelle, avec stipulation que le défaut de la payer deux mois après son échéance entraînera la perte de la faculté de réméré, proroge de trois mois le délai de six ans susmentionné en écrivant au vendeur une lettre ainsi conçue : "En réponse à votre lettre, je vais laisser les actes comme ils sont ; pour l'intérêt dû prochainement, j'espère que vous ne dépasserez pas trois mois ; c'est votre avantage encore plus que le mien de travailler à rencontrer vos intérêts corrects, car plus on a d'argent à donner à la fois plus il est difficile de payer. Soyez sans inquiétude, quoique votre réméré soit fini, je ne ferai rien vendre et vous attendrai trois mois pour votre intérêt. Espé-
rant vous donner satisfaction par ce délai que je considère raisonnable, votre, etc."

Le jugement inscrit en Révision et qui est infirmé a été rendu en Cour Supérieure, LARUE, J., à Montmagny, le 30 novembre 1906, comme suit :

" Considérant que le droit de réméré stipulé en faveur du demandeur dans l'acte de vente du 30 décembre 1899, est expiré le 30 décembre 1905, et que le demandeur ne l'ayant pas exercé dans le dit délai ; en a encouru la déchéance ;

" Considérant qu'il n'est pas en preuve que la dite défenderesse ait prolongé le dit délai, et que les écrits qu'invoque le demandeur n'avaient pas cet effet ;

" Considérant que, par suite de cette déchéance du droit de réméré encourue par le demandeur, la défenderesse s'est trouvée, dès le 30 décembre 1905, propriétaire incommutable des biens vendus et pouvait en disposer comme telle ;

" Considérant que le demandeur n'a pas établi les allégations essentielles de sa demande, et que la défenderesse a prouvé le bien fondé de ses défenses :

“ Renvoie l'action du demandeur avec dépens.”

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Le 30 décembre 1899, Dupont a vendu, par acte notarié, à Damase Babin, représenté dans la présente cause par sa veuve, Dame Philomène Cloutier, certains immeubles décrits à l'acte et, en outre, tous ses animaux, voitures et instruments d'agriculture, dont la liste et inventaire n'est pas annexé à l'acte. Cette vente fut faite pour le prix de deux cent cinquante piastres, payées dès avant la passation de l'acte à Dupont, à qui la faculté de réméré fut accordée pendant six ans, à compter du 30 décembre 1899.

L'acte stipulait, entr'autres choses, premièrement : la réserve en faveur du demandeur de la jouissance et usufruit des biens vendus en par lui payant les taxes et cotisations ou autres redevances auxquelles les immeubles étaient tenus, et en payant à l'acheteur, pour cette jouissance et usufruit, une rente annuelle de quinze piastres ; deuxièmement : au cas où Dupont serait plus de deux mois après l'expiration de l'échéance de la rente, sans l'avoir acquittée, il perdait par ce fait même le droit de réméré des immeubles et meubles, dont Babin pourrait alors disposer en les vendant ou autrement ; troisièmement : avant de racheter les meubles et immeubles, Dupont devait donner à Babin, au préalable, un avis de trois mois.

Dupont est resté en possession des meubles et immeubles par lui vendus et en a joui comme usufruitier, pendant tout le délai stipulé pour l'exercice de la faculté de réméré, c'est-à-dire depuis le 30 décembre 1899, jusqu'au 30 décembre 1905, date où expirait le terme pour le réméré.

Dupont n'a pas restitué à Babin, ou à sa femme, le prix de vente de deux cent cinquante piastres dans le terme stipulé et en vertu de l'acte, il serait apparemment déchu du droit de reprendre ses meubles et immeubles.

Mais il prétend que le terme de six ans a été élargi de trois mois, au moins, par convention spéciale et par écrit, en date du mois de novembre 1905, c'est-à-dire, avant l'expiration du dé-

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lai pour réméré, et il ajoute que, pendant ces trois mois, il a offert le remboursement des deux cent cinquante piastres et intérêts à la défenderesse, qui a refusé son offre, de même qu'elle a refusé de lui bailler un titre de retrait ou de rétrocession des meubles et immeubles.

Dupont appuie sa prétention sur deux documents sous seing privé, provenant de la défenderesse, écrits et signés par elle. Le premier de ces écrits, en date du 18 novembre 1905, est une lettre de la défenderesse en réponse à celle que la femme de Dupont lui avait adressée quelques jours avant, pendant l'absence de son mari, qui était depuis plusieurs mois dans les chantiers.

La lettre de la femme Dupont avait été écrite à l'époque où le terme du réméré était expiré, ou sur le point d'expirer. A cette époque, Dupont n'avait pas en mains les deniers suffisants pour payer madame Babin, et on conçoit les anxiétés de sa femme au sujet de leur propriété vendue à réméré à Babin, pour la somme de \$250.00, mais valant au-delà de mille piastres et qui, si les deux cent cinquante piastres n'étaient pas remboursées, serait sacrifiée et deviendrait la propriété de madame Babin. La femme Dupont a dû exprimer ses craintes dans la lettre adressée à la défenderesse, ainsi que le ton de la réponse de cette dernière le fait voir. Cette réponse, écrite par une personne illettrée, n'observe guère les règles grammaticales et de la ponctuation. Elle est rédigée comme suit: "Madame. En réponse à votre lettre, je vais laisser les actes comme ils sont; pour l'intérêt dû prochainement, j'espère que vous ne dépasserez pas trois mois; c'est votre avantage encore plus que le mien de travailler à rencontrer vos intérêts corrects, car plus on a d'argent à donner à la fois plus il est difficile de payer. Soyez sans inquiétude; quoique votre réméré soit fini, je ne ferai rien vendre et vous attendrai trois mois pour votre intérêt. Espérant vous donner satisfaction par ce délai que je considère raisonnable. Votre très humble, (Signé) DAME VEUVE E. D. BABIN."

Disséquons cette réponse et examinons-en les termes séparément et collectivement pour comprendre la pensée de l'auteur et savoir si elle a étendu le délai de réméré.

Elle dit: "En réponse à votre lettre je vais laisser les actes
 " comme ils sont. Par ces mots pris avec le contexte qui suit:
 " Madame Babin disait qu'elle ne changerait pas l'acte, que
 " l'acte resterait en force et qu'elle n'entendait pas le modi-
 " fier, ni l'amender. Or, si l'acte restait, ou devait rester, tel
 " qu'il était, Dupont conservait donc son droit de réméré et
 " ne perdait aucun des droits et avantages lui dérivant de
 " l'acte, et ce, pendant le délai que nous indiquerons dans un
 " instant. La lettre continue: " pour l'intérêt dû prochaine-
 " ment j'espère que vous ne dépasserez pas les trois mois. Soyez
 " sans inquiétude. "

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L'intérêt, ou la rente de quinze piastres devenait dû le 30 décembre 1905. Il avait été convenu et arrêté entre les parties que le défaut de payer régulièrement la rente ferait encourir la déchéance du droit de réméré. Mais cet intérêt n'était payable que deux mois après son échéance. Alors, l'inquiétude de la femme Dupont ne devait pas résulter de l'incapacité de payer les intérêts, surtout lorsqu'à cette époque elle avait plus de trois mois pour le payer, mais son inquiétude devait être au sujet du remboursement du prix et au sujet de l'extension du délai pour le payer. Du moment que la défenderesse écrivait à la femme Dupont d'être sans inquiétude, c'est qu'elle lui disait: les actes restent tels qu'ils sont, vous aurez droit de rembourser plus tard le capital et les intérêts. Puis elle conclut: " quoique votre
 " réméré soit fini je ne ferai rien vendre et vous attendrai pour
 " votre intérêt. Espérant vous donner satisfaction par ce
 " délai que je considère raisonnable. "

Evidemment la défenderesse avait à l'esprit les termes de l'acte de vente qui dit qu'à défaut par Dupont d'acquitter la rente dans les deux mois après son échéance, il perdait par ce fait le droit de rémérer les immeubles et qu'en ce cas Babin pourrait en disposer par vente ou autrement.

Or, au lieu de se prévaloir de cette clause et stipulation qui lui donnait le droit de vendre et disposer des immeubles au cas où la rente ne serait pas payée, la défenderesse dit qu'elle ne fera rien vendre, et qu'elle attendra trois mois au lieu de

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deux pour l'intérêt, espérant donner à la femme Dupont satisfaction par ce délai qu'elle considérait raisonnable. C'aurait été une faible satisfaction à donner à la femme Dupont que de lui accorder un délai d'un mois pour les intérêts. La défenderesse avait raison lorsqu'elle disait que le rémunéré était fini. En effet, il l'était à la date du 18 novembre 1905, car Dupont n'avait pas, tel que stipulé par l'acte, donné, au préalable, à la défenderesse un avis de trois mois de son intention d'exercer le rémunéré. Or, si le terme était expiré, si Dupont était déchu du droit de reprendre sa propriété, si la défenderesse Cloutier était propriétaire incontestable des immeubles et des meubles, comment se fait-il qu'elle n'ait pas tenu le langage d'un propriétaire et d'une personne qui réclame tous ses droits sans égard envers une autre personne. Trouve-t-on dans sa lettre un seul mot à l'effet qu'elle refuse péremptoirement une demande de délai ? C'est le contraire qui est vrai, et nous croyons que cet écrit d'une personne illettrée, considéré comme tout ou dans ses parties, comporte l'intention arrêtée de la défenderesse d'étendre le délai de rémunéré pendant trois mois.

Subséquentement, le 2 de février, elle reçoit de Dupont par l'entremise et lettre de sa femme, la somme de quinze piastres, pour les intérêts de l'année 1905, et le même jour elle écrit à la femme de Dupont, sur le dos du reçu qu'elle, la défenderesse, serait satisfaite de voir son mari, non à St Jean, mais au couvent de Ste Anne, où elle sera jusqu'en juillet. Pourquoi désirer voir Dupont et exprimer sa satisfaction de le rencontrer jusqu'en juillet, si vraiment la défenderesse n'avait pas l'intention de lui remettre sa propriété, au cas où elle serait remboursée ? Dans la circonstance, pour une personne honnête et bienveillante et ne voulant pas profiter indûment d'une clause rigoureuse d'un contrat, il y avait satisfaction de voir le débiteur s'acquitter de sa dette, et de lui remettre sa propriété, mais pas autrement.

A tout événement quelle satisfaction pouvaient avoir les parties de se rencontrer, si le créancier était devenu propriétaire de propriétés valant mille piastres lorsqu'il n'avait avancé que deux cent cinquante piastres ? Et surtout quelle satis-

faction pouvait avoir dans la circonstance le débiteur de rencontrer son créancier ? L'invitation faite par le défendeur de la rencontrer devait avoir un but et une cause, et le seul but apparent et raisonnable était au sujet du réméré.

Nous croyons que ces écrits expriment l'intention formelle de la défenderesse d'étendre le délai du réméré pendant trois mois à compter du 30 décembre 1905, et que, partant, ce délai expirait le 30 mars 1906.

Nous sommes d'autant plus autorisés à donner l'interprétation ci-dessus à l'écrit, que la loi, Art. 1019 C. C., dit que, dans le doute, les contrats s'interprètent contre celui qui a stipulé, et en faveur de celui qui a contracté l'obligation.

Il a été démontré que Dupont avait, en mars, le 14, offert à la défenderesse les deux cent cinquante piastres, prix de vente de l'acte à réméré, afin de reprendre ses propriétés, et que le 30 mars, la même offre a été répétée par le ministère d'un notaire, qui l'a sommée de passer un acte de rétrocession, ce à quoi la défenderesse a répondu qu'elle avait vendu consciencieusement.

Nous croyons que l'action par laquelle le demandeur dépose deux cent cinquante piastres et les intérêts dus en vertu de l'acte à réméré, et par laquelle il demande à ce que la défenderesse soit condamnée à signer un acte de rétrocession des immeubles est bien fondée et qu'elle doit être maintenue.

Si la défenderesse a manqué à la parole donnée, le fait en est attribuable à un nommé Deschesnes qui, anxieux d'acquérir les propriétés du demandeur à vil prix, s'en est fait consentir une vente par la défenderesse pour \$250, en lui représentant que Dupont dissipait ses biens et que, partant, il avait perdu le terme du réméré.

La cour de première instance n'a pas donné à l'écrit discuté l'interprétation qui nous y fait trouver une prorogation de délai et a renvoyé l'action.

Nous croyons que ce jugement est mal fondé et doit être infirmé avec dépens des deux cours.

Maurice Rousseau, pour le demandeur.

J. A. Bender, C. R., pour la défenderesse.

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SUPERIOR COURT.

MONTREAL, December 6th 1906.

Present :—MATHIEU, J.

MACE v. GARDNER & McMILLAN, T. S.

Procedure—Attachment by garnishment —Attachment of wages in Superior Court—Art. 1147a C. P.

HELD :—Art. 1147a C. P. which forbids further attachment of wages when a declaration and deposit are made as therein provided, applies to attachments by garnishment in the Superior Court, as well as in the Circuit Court. *Cf. contra Larochelle v. Lavoie & C. P. R. Co.* 27 S. C. 534.

MATHIEU J. :—

On the 20th February, 1905, the plaintiff caused to be issued against the defendant, under the name of Jay Gardner, a writ of seizure after judgment, for the purpose of attaching in the hands of John W. McMillan and Charles A. McMillan, both carrying on business together, at Montreal, under the name of "Sugars, Limited," ordering them to appear on the 28th February, 1905, and to declare under oath what movable property they had in their possession belonging to the defendant, and what they owed him, in execution of a judgment obtained by the plaintiff against the defendant on the 3rd December, 1903, for the sum of \$180.03 with interest from the 8th March, 1899, and the costs taxed at the sum of \$26.30. On the 28th February, 1905, the garnishees declared that the defendant was in their employ at a salary of fifty dollars per month, and that on the 15th March following, they would owe him the sum of fifty dollars for one month's salary. The defendant contested the seizure, alleging that long before it was issued, to wit, the 15th January, 1905, the defendant, in a certain case in the Circuit Court of the district of Montreal, in which one Bailey was plaintiff and he, Jay Gardner, was defendant, he filed in the hands of the clerk of the Circuit Court, a declaration under oath, stating the amount of his

salary, as well as the name, occupation and place of business of the person who paid it and the dates on which it was payable, and that the defendant thereupon deposited and still deposits the seizable portion of his salary at each period at which it is paid to him, in the hands of the clerk of the Circuit Court ; that he (defendant) is still employed by the same firm and that the conditions surrounding his employment are still the same ; that the declaration under oath of the defendant, as above outlined, was not contested ; that the defendant's employer at the time of the declaration is the garnishee in the present instance, as it is made to appear in the declaration ; that the garnishees, at the time of the service upon them of the present attachment by garnishment, had not, do not now possess, and will not have anything belonging to the defendant, and they now owe him, and will only owe him, in the future his salary ; and the defendant concludes by asking that the seizure by garnishment be discharged and dismissed with costs. In answer to the above contestation, the plaintiff alleges that at the time of the issuing of the attachment by garnishment, he had no information or knowledge of the declaration the defendant alleges he had made, and, moreover, the declaration does not appear to have been made by the defendant, but by a person named James Gardner, and, therefore, the defendant cannot invoke it as against the plaintiff.

By article 1147a C. C. P., as contained in section 1 of chapter 57 of the Statutes of Quebec, 1903, 3 Edward VII, intituled : "An act to amend the Code of Civil Procedure with respect to the seizure of salaries and wages," it is enacted that:

" If within seven days of the judgment, or at any time before the execution, the defendant deposits with the clerk of the Court the portion of his salary or wages liable to seizure under paragraph 11 of article 599, and, at the same time produces a declaration under oath, setting forth the amount of such salary or wages, as well as the name, occupation and place of business of the person who pays the same, and the time when the same are payable, and continues to deposit such portion so seizable at each term of payment until full

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“ payment of the judgment, no seizure by garnishment can
“ be issued against such defendant to seize such salary or
“ wages.”

It is further enacted in and by the statute that “ the clerk
“ of the Circuit Court must keep an alphabetical list of the
“ defendants who have made such declarations.”

The fact that article 1147a is inserted in the Code of Civil Procedure in that part of the code which regulates and governs procedure in and before the Circuit Court, is a clear indication and direction that the proceedings provided by the statute shall be made in the Circuit Court, but it necessarily does not follow that the effect of the statute insofar as such procedure is concerned, is limited and confined to Circuit Court cases. In every case in which a defendant has rigorously conformed to the provisions of the statute, article 1147a, absolutely prohibits, in a general sense, the issuing, as against such defendant, of any seizure or attachment by garnishment, and, in a case in which the law makes no distinction, as in the present one, no difference can be made between attachments by garnishment issued from the Circuit Court and attachments by garnishment issued from the Superior Court. The defendant seems to have conformed to the requirements of the law in every particular and, therefore, the present plaintiff was without color of right in causing the present attachment by garnishment to be issued against the defendant. The fact that the clerk of the Circuit Court is obliged to keep an alphabetical list of the defendants who make declarations in accordance with the provisions of article 1147a, C. C. P., is a clear indication of the intention of the law that creditors should by means of this index ascertain for themselves, and for their own protection, whether or not their debtor is depositing under the provisions of the statute. The error made in the name of the defendant appears to the Court to arise more from a mistake in procedure on the part of the plaintiff than from any fault on the defendant's side. In any event, the Court considers the error of very small importance. The plaintiff could, by referring to the index kept by the

clerk of the Circuit Court, have easily ascertained that the defendant was regularly depositing the seizable portion of his salary in the hands of the clerk. The contestation of the attachment by garnishment is well founded. Consequently, it is maintained, and the attachment by garnishment is discharged and dismissed with costs against the plaintiff.

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Oughtred, Place & Phelan, for the plaintiff.

Bérard, Brodeur & Bérard, for the defendant.

COUR SUPÉRIEURE.

QUÉBEC, 22 décembre 1906.

Présent :—LANGELIER, Juge en chef suppléant.

GRÉGOIRE v. BEAURIVAGE ET AL.

Simulation—Nantissement déguisé sous le nom de vente à réméré—Effet entre les parties—Effet vis-à-vis des tiers.

JUGÉ :—Un acte qualifié par les parties de vente à réméré est, en réalité, quant à elles, un simple nantissement s'il est constant que l'intention de l'acheteur en le souscrivant n'était que de prendre une garantie pour le remboursement d'une dette et non de faire l'acquisition de l'immeuble. La possession qui en est laissée au soi-disant vendeur au-delà du terme du réméré et la reconnaissance de l'acheteur suffisent pour établir cette intention. Du reste, quelle qu'en soit la portée entre les parties, l'acte simulé vaut ce qu'il est à sa face et prend effet comme tel, vis-à-vis des tiers.

LANGELIER, J. :—

Le demandeur poursuit les défendeurs en pétition d'hérédité et en partage. Il demande d'être déclaré propriétaire pour un douzième de deux immeubles et de certains effets mobiliers dont le défendeur est en possession, et qu'ils soient partagés entre lui et les défendeurs. Il prétend avoir droit à ce douzième comme héritier pour un sixième de sa mère Josephine Laroché, laquelle en avait la moitié comme sa part dans la communauté qui existait entre elle et le mis-en-cause.

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Le défendeur Beaurivage plaide que les immeubles dont le demandeur se prétend propriétaire pour un sixième ont, en effet, formé partie de la communauté qui a existé entre le mis en cause et Josephine Laroche ; mais qu'ils en sont sortis le 27 janvier 1898, par la vente que le mis en cause en a alors faite à Ignace Paquet avec faculté de réméré ; que ces immeubles n'ont été rétrocédés par Ignace Paquet au mis en cause que le 3 mai dernier, alors que le temps accordé au mis en cause pour exercer la faculté de réméré était expiré depuis longtemps, et qu'Ignace Paquet en était alors devenu propriétaire absolu. Suivant lui, cette prétendue rétrocession au mis en cause n'a été, au fond, qu'une vente que lui a faite Paquet.

Le demandeur répond à ce plaidoyer que la vente à réméré des immeubles en question par le mis en cause à Ignace Paquet était, non point une véritable vente, mais une dation en nantissement pour garantir le paiement d'une dette de \$950. que le mis en cause lui devait, que, partant, la communauté entre le mis en cause et Josephine Laroche n'a jamais perdu le droit de se faire rétrocéder ces immeubles en remboursant à Paquet la somme pour laquelle ils lui avaient été donnés en nantissement, et que, lorsqu'ils ont été rétrocédés, le 3 mai dernier, ils l'ont été pour une cause qui a pris naissance pendant la communauté, et que leur rétrocession a eu simplement pour effet de leur faire prendre, dans l'actif de la communauté dissoute, la place du droit qu'elle avait à la rétrocession.

Voici les faits de la cause : Le mis en cause et Josephine Laroche ont été mariés sous le régime de la communauté, et les immeubles en question ont été acquis pendant la communauté et à titre onéreux. Ils y sont donc tombés. Pendant qu'ils en formaient partie, le mis en cause, qui en était le chef, les a vendus à Ignace Paquet pour \$940. mais s'est réservé le droit d'en effectuer le réméré pendant un an, Ignace Paquet lui en a laissé la possession et la jouissance, et il n'avait aucune intention de les acquérir pour les garder : l'achat qu'il en faisait n'avait pour but que de se les faire donner en nantissement pour garantir une dette de \$940, que lui devait le mis en cause. Paquet dit qu'il a toujours été prêt à en faire la

rétrocession au mis en cause, même après l'expiration de l'année, pourvu qu'on lui remboursât en capital et intérêt les \$940 pour lesquelles ils lui avaient été donnés en garantie.

Le mis en cause n'a payé ni le capital, ni les intérêts, des \$940 et devait à Ignace Paquet, lors du décès de Josephine Laroche, une somme totale de \$1,512.50.

Josephine Laroche est décédée le 6 janvier dernier sans laisser de testament, et lors de son décès elle avait six enfants, y compris le demandeur. Ces enfants sont donc ses héritiers chacun pour un sixième. Le printemps dernier, le mis en cause qui, comme je l'ai dit il y a un instant, était resté en possession des immeubles, entra en négociation avec le défendeur Beaurivage pour les lui vendre, ainsi que le roulant qui s'y trouvait. Le prix du tout fut fixé à \$2,612.50. Le 3 mai, Beaurivage paya, à même ce prix, tout ce qui était dû à Ignace Paquet, savoir, la somme de \$1,512.50. Ignace Paquet, étant ainsi payé, donna au mis en cause quittance finale de tout ce qui lui était dû, et lui consentit une rétrocession des immeubles. Immédiatement après, par un acte passé devant le même notaire, et dont le numéro est 4063 alors que celui de la quittance est 4062, le mis en cause vendit au défendeur Beaurivage pour le prix convenu de \$2,612.50 les immeubles et tout le roulant qui s'y trouvait.

Quelles conséquences devons-nous tirer de ces faits ?

L'on doit interpréter les contrats d'après l'intention des parties, sans s'attacher strictement aux mots dont elles se sont servies, et en tenant compte des circonstances dans lesquelles elles se trouvaient lorsqu'elles les ont employés.

Or, il n'y a aucun doute que la vente par le mis en cause à Paquet en 1898 n'a pas été une vraie vente, mais un contrat de nantissement dissimulé sous la forme d'une vente. Paquet ne désirait aucunement avoir les immeubles pour les garder : tout ce qu'il voulait, c'était une garantie pour le remboursement de ce que lui devait le mis en cause. Il le dit expressément dans sa déposition devant cette cour, et sa manière d'agir ne laisse aucun doute qu'il dit la vérité. En effet, comme nous l'avons vu, il ne s'est pas fait livrer les immeubles ; il en a

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laissé la possession au mis-en-cause, et s'est comporté après la vente absolument comme il aurait pu le faire si le mis-en-cause lui eût seulement consenti une hypothèque sur ces immeubles.

Puisqu'ils étaient seulement donnés en nantissement, la communauté a conservé tout le temps le droit de se les faire rétrocéder par Paquet, et l'expiration du délai fixé pour exercer le réméré ne lui a pas fait perdre ce droit.

C'est ce qu'a décidé la Cour de Révision de Québec dans la cause non rapportée de Pacaud contre un nommé Lavigne, je crois. Dans cette dernière cause, il s'agissait d'un cultivateur qui avait vendu pour \$100 une terre qui en valait \$1,500 mais qui s'était réservé le droit, pendant un an, de la reprendre en remboursant les \$100 avec les intérêts. Pacaud, le prétendu acheteur, avait, par l'acte de vente, donné un bail de la terre au vendeur. Celui-ci n'ayant pas exercé le réméré pendant l'année, Pacaud se prétendit propriétaire de la terre et refusa le remboursement des \$100 et des intérêts dûs sur cette somme. La cour d'Arthabaska maintint son action, mais la Cour de Révision, composée des juges Meredith, Stuart et Taschereau, renversa son jugement, et décida que, comme la prétendue vente, d'après les circonstances de la cause, n'avait été qu'une constitution de nantissement, on devait, entre les parties, ne tenir compte que du vrai contrat intervenu entre elles et ne pas s'occuper du contrat qu'elles paraissaient avoir fait.

Si donc la question se présentait entre Paquet et la communauté ou entre les représentants de la communauté, il n'y a pas de doute qu'il faudrait considérer la communauté comme n'ayant jamais perdu le droit de rentrer en possession des immeubles en litige.

Mais elle se présente entre la communauté ou ses représentants et le défendeur Beaurivage, lequel est un tiers. Or, c'est un principe bien connu que si, entre les parties à un acte simulé, la vraie convention est celle qu'elles ont *entendu* faire et non celle qu'elles ont *paru* faire, pour les tiers la vraie convention est celle qu'elles ont *paru* faire. Or, quelle est la convention qu'ont *paru* faire le mis-en-cause et Paquet ? C'est

une vente à réméré. Pour le défendeur Beaurivage la convention entre le mis-en-cause et Paquet doit donc être traitée comme une vente à réméré. Si c'est une vente à réméré, le délai fixé pour l'exercice du réméré étant expiré depuis longtemps le 3 mai dernier, Paquet était alors propriétaire absolu et incommutable des immeubles vendus à réméré. Il pouvait donc en transférer la propriété. C'est ce qu'il a fait par le prétendu acte de rétrocession au mis-en-cause. Celui-ci, devenu propriétaire, a donc pu transférer au défendeur Beaurivage la propriété des immeubles en question.

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Il y a une autre objection péremptoire à l'action du demandeur quant à ces immeubles : c'est que la rétrocession n'a pas été faite à la communauté, mais au mis-en-cause personnellement. Elle n'a donc point pu profiter à la communauté, et alors même que le défendeur Beaurivage ne serait pas devenu propriétaire par la vente que lui a faite le mis-en-cause, il pourrait repousser leur action en leur disant qu'ils ne sont pas propriétaires de ces immeubles.

L'action des demandeurs doit donc être renvoyée quant à ce qui touche les immeubles revendiqués par les demandeurs.

L. P. Grenier, pour le demandeur.

Bédard, Roy, Chalout & Prévost, pour le défendeur.

Chas Smith, pour le mis-en-cause.

COUR SUPÉRIEURE.

QUÉBEC, 22 décembre 1906.

Présent :—LANGELIER, Juge en chef suppléant.

FOURNIER ET VIR v. GRÉGOIRE.

Mariage—Actes de la femme—Autorisation du mari—Son concours aux actes de sa femme—Interprétation des lois—Nullité absolue et qui peut s'en prévaloir.

JUGÉ.—Le "concours du mari dans l'acte" exigé par l'article 177 C. C. pour

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rendre valide l'aliénation de ses biens par la femme doit s'entendre dans le sens vulgaire et ordinaire du mot. Par suite, une vente d'immeuble faite par une femme mariée seule, quoique son mari qui se trouvait dans une pièce voisine séparée par une mince cloison, ait entendu tout ce qui se passait, est nulle. Cette nullité étant absolue, tous ceux qui y ont un intérêt né et actuel peuvent s'en prévaloir, entr'autres, celui à qui la prétendue vente a été faite.

LANGELIER, J. :—

La demanderesse Fournier poursuit le défendeur en passation de titre. Elle prétend lui avoir vendu un emplacement situé à St Michel.

Le défendeur nie la vente alléguée par la demanderesse, et plaide que tout ce qui a eu lieu entre eux ce sont des pourparlers en vue d'une vente, mais que cette vente ne devait avoir lieu que si, après avoir visité la propriété, il en était satisfait.

La demanderesse a, suivant moi, prouvé la vente qu'elle allègue, mais cette vente est-elle valide ?

La demanderesse est une femme mariée séparée de biens. Elle ne pouvait vendre un immeuble qu'avec l'autorisation de son mari. A-t-elle obtenu cette autorisation ? Dans notre ancien droit, non seulement l'autorisation maritale devait être expresse, mais elle devait être donnée en termes presque sacramentels, en disant que la femme était *autorisée* par son mari. Pothier dit que peut-être il suffirait qu'on eût dit que la femme était *habilitée* par son mari, mais il en doute. Jamais il n'y avait alors d'autorisation tacite.

Les rédacteurs de notre code civil ont modifié ces règles de notre ancien droit, et ont adopté les règles posées par le Code Napoléon. Dans l'article 177, ils disent que l'autorisation peut être expresse ou tacite. Si elle est expresse elle doit être donnée par écrit, mais il suffit que l'écrit indique en n'importe quels termes que le mari consent à l'acte que veut faire sa femme.

L'autorisation maritale ne peut être donnée tacitement que d'une seule manière : par le *concours du mari* dans l'acte. Le concours c'est l'acte de *concourir*. Or, qu'est-ce que concourir dans un acte ? C'est y prendre part, y coopérer, y agir con-

jointement avec un autre. C'est là le sens vulgaire et ordinaire du mot *concourir*. Or, il est de règle que lorsqu'une expression se rencontre dans une loi, on doit la prendre dans son sens ordinaire et vulgaire, à moins que le contexte n'indique qu'il faut lui donner un autre sens. Or, nous n'avons rien ici dans le contexte de l'art. 177 qui nous autorise à donner à l'expression *concours* un sens autre que son sens vulgaire et ordinaire.

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Avons-nous ici le concours du mari de la demanderesse à la vente qu'elle a faite ? Il nous dit lui-même que tout ce qu'il a fait a consisté à se tenir dans une pièce voisine de celle où étaient sa femme et le défendeur. Il ajoute que, comme les deux pièces n'étaient séparées que par une cloison mince, il a entendu tout ce qu'ils ont dit. Comme on le voit, il n'a pris aucune part quelconque à la convention qui a eu lieu entre sa femme et le défendeur.

La vente qui est prouvée en cette cause en est donc une qui a été faite par une femme mariée non autorisée par son mari. D'après l'art. 183 cette vente est frappée d'une nullité telle qu'elle doit être considérée comme n'existant pas, et que tous ceux qui y ont intérêt peuvent en méconnaître l'existence. Le défendeur ayant un tel intérêt peut donc en invoquer la nullité.

En conséquence, l'action de la demanderesse doit être renvoyée avec dépens.

Cimon & Sévigny, pour les demandeurs.

E. Mercier, pour le défendeur.

H. A. Turcotte, C. R., conseil.

COUR SUPÉRIEURE.

QUÉBEC, 28 décembre 1906.

Présent :—LANGELIER, Juge en chef suppléant.

L'HOPITAL-GÉNÉRAL V. DUFRESNE ET VIR.

Privilège sur les immeubles—Privilège pour frais de poursuite—Procédure—Recours hypothécaire contre le tiers acquéreur d'un immeuble frappé d'un privilège—Distraction de dépens—Cession de créance—Chose jugée—Compétence—Renvoi d'action par un tribunal incompetent au tribunal compétent—Dépôt du montant réclamé—Frais d'action.

JUGÉ :—1o. Les frais d'une action pour recouvrer une dette privilégiée sur un immeuble sont privilégiés au même titre que la dette dont ils sont l'accessoire. Le créancier a donc l'action hypothécaire pour les recouvrer d'un tiers acquéreur de l'immeuble affecté au privilège.

2o. Le jugement qui déboute un demandeur d'une action en recouvrement de frais pour le motif qu'elle appartient à son procureur *ad litem* en vertu de la distraction de dépens, ne constitue pas chose jugée dans une deuxième poursuite intentée par le même demandeur pour recouvrer les mêmes frais en vertu d'une cession que lui en a consentie son procureur *ad litem*.

3o. Lorsqu'une action intentée devant un tribunal incompetent *ratione materie* est renvoyée d'office devant le tribunal compétent, le dépôt du montant réclamé fait par le défendeur avant que le renvoi n'ait eu lieu ne le soustrait pas à l'obligation de payer les frais.

LANGELIER, J. :—

La demanderesse est propriétaire d'une seigneurie située en la paroisse de St Sauveur de Québec ; elle a poursuivi un nommé Maranda qui était détenteur d'un immeuble compris dans sa seigneurie, et obtenu jugement contre lui. Plus tard, Maranda, qui n'avait pas payé le montant du jugement, a vendu l'immeuble à la défenderesse Dufresne, et elle s'est engagée à payer les arrérages de rente seigneuriale pour lesquels le demandeur avait obtenu jugement contre lui, mais elle ne s'est pas engagée à lui payer les frais.

La défenderesse Dufresne a payé tous les arrérages qu'elle s'était engagée à payer, mais elle a refusé de payer les frais pour lesquels le demandeur avait jugement contre Maranda. La demanderesse a alors pris contre elle une action hypothécaire en recouvrement de ces frais. Comme elle ne s'était pas fait transporter la créance des frais par son procureur qui en était créancier en vertu de la distraction de dépens que la loi lui avait donnée, l'action a été renvoyée sur ce motif qu'elle appartenait au procureur de la demanderesse et non pas à la demanderesse elle-même.

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La demanderesse s'est alors fait céder par son procureur sa créance de frais contre Maranda et a intenté l'action en cette cause. Dans sa déclaration il allègue que cette créance lui a été transportée.

La défenderesse admet que l'immeuble qu'elle a acheté de Maranda, et dont elle est en possession comme propriétaire, était grevé de la rente seigneuriale pour les arrérages de laquelle la demanderesse a poursuivi Maranda et obtenu jugement contre lui, mais elle plaide que le jugement, qui a renvoyé la première action intentée par la demanderesse contre elle, constitue chose jugée dans celle-ci ; elle plaide, en outre, que le transport de la créance de frais du procureur de la demanderesse contre Maranda ne lui a pas été signifiée.

Débarrassons-nous de suite de cette dernière objection. Elle ne peut pas tenir en face du jugement du Conseil Privé dans la cause de La Banque de Toronto contre la St Lawrence Insurance Company. On sait qu'il a été décidé dans cette cause par le Conseil Privé que la signification d'une action fondée sur un transport de créance constitue une signification suffisante de ce transport.

J'en viens maintenant à la question de chose jugée. Y a-t-il chose jugée entre les parties ? L'art. 1241 du code civil exige pour qu'il y ait chose jugée que les deux actions aient la même cause, qu'elles soient entre les mêmes parties, et pour la même chose. Dans la cause actuelle il y a identité de parties et identité de choses. Y a-t-il identité de cause ? La cause c'est le fait juridique qui donne naissance à l'action.

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Quel est le fait juridique qui a donné naissance à l'action de la demanderesse ? C'est le transport que lui a fait son procureur de la créance qui avait pris naissance en faveur de celui-ci par la distraction de dépens qu'il avait obtenue.

Quelle était la cause de l'action de la demanderesse qui a été renvoyée ? C'était la créance de frais résultant du jugement qu'elle avait obtenu contre Maranda. On voit donc de suite que la cause des deux actions n'est pas la même. Dans l'action qui a été jugée contre la demanderesse, il s'agissait pour elle de recouvrer une créance qu'elle prétendait avoir pris naissance en sa faveur ; la cour a décidé qu'elle n'avait pas pris naissance en sa faveur, mais en faveur de son procureur. Dans la cause actuelle, la demanderesse ne prétend pas que la créance dont elle demande le paiement a pris naissance en sa faveur ; il dit, au contraire, qu'elle a pris naissance en faveur de son procureur, mais elle ajoute que son procureur la lui a transportée. Sa prétention ne tend donc pas à contredire le jugement qui a été rendu entre elle et la défenderesse. Au contraire, elle traite comme bien rendu le jugement qui a déclaré qu'elle appartenait à son procureur, puisqu'elle allègue que son procureur la lui a transportée.

Il n'y a pas chose jugée entre les parties. Il ne me reste plus qu'à adjuger sur les dépens. Aussitôt qu'a été rendu le jugement par lequel la Cour de Circuit s'est déclarée incompétente pour prendre connaissance de la présente cause et avant qu'elle n'ait été renvoyée devant cette cour, la défenderesse a déposé devant la Cour de Circuit le montant des frais qu'on lui avait réclamés ; doit-elle être condamnée à payer les dépens en cette cause ? Elle prétend que non, parce que, dit-elle, la procédure faite contre elle devant la Cour de Circuit était complètement nulle. Ceci paraît parfaitement logique. Malheureusement on ne trouve pas toujours de la logique dans le code de procédure. L'art. 171 déclare que, si le renvoi d'une action pour incompétence "*ratione materie*" n'est pas demandé par le défendeur, le tribunal est tenu de la renvoyer d'office devant le tribunal compétent. C'est précisément ce qu'a fait la Cour de Circuit dans le cas qui nous occupe. Elle

aurait pu adjuger sur les dépens d'après l'art. 172, mais elle n'a pas jugé à propos de le faire. Alors, je suis d'avis que la cause doit être traitée, quant aux frais, comme si l'action eût été dès l'origine intentée devant cette cour. Or, il n'y a pas de doute que si elle eût été intentée devant cette cour, la défenderesse aurait dû être condamnée à payer les dépens.

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La somme qu'elle a déposée, et qui ne couvre pas les frais d'action, est donc insuffisante, et elle doit être, en conséquence, condamnée à payer les frais en cette cause.

M. Chouinard, C. R., pour le demandeur.

A. Corriveau, C. R., pour les défendeurs.

COUR SUPÉRIEURE

QUÉBEC, 31 décembre 1906.

*Présent :—*LEMIEUX, J.

VERMETTE v. VERMETTE

Procédure—Demande de cession de biens—Créance qui donne droit de la faire—Valeur d'un dépôt—Qualité de commerçant—Exercice d'un métier.

JUGÉ :—1o. Celui qui exerce un métier (v. g. la mégisserie) consistant à traiter des matières appartenant à autrui et dont il ne fait pas l'achat pour les revendre, n'est pas commerçant aux termes du §2 de l'art. 853 C. P. C. Il n'est partant pas tenu de se rendre à une demande de cession de biens formée contre lui.

2o. Le déposant n'est pas le créancier du depositaire pour la valeur du dépôt, au sens du même article. Par suite, une créance qui ne s'élève à \$200. ou plus, qu'en y ajoutant une réclamation de cette nature, ne donne pas droit de former une demande de cession de biens.

LEMIEUX, J. :—

Joseph Achille Vermette se déclarant le créancier pour un montant de plus de deux cents piastres non garanti de

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François Vermette, a fait à ce dernier une demande de cession de ses biens pour le bénéfice de ses créanciers.

François Vermette a contesté la demande de cession, alléguant en substance dans sa contestation, qu'il n'était pas le débiteur du requérant pour le montant de deux cents piastres, et que de plus, il n'était pas commerçant.

La loi requiert, entr'autres conditions, pour faire une demande de cession de biens :—1o.—que le débiteur soit commerçant; 2o.—que la créance du créancier poursuivant la demande de cession soit liquide et non garantie, et pour une somme de deux cents piastres ou plus; 3o.—que le débiteur ait cessé ses paiements et qu'il ait été requis de faire cession de ses biens.

La preuve a établi les faits suivants :

François Vermette est mégissier de son état, c'est-à-dire que son occupation consiste à repasser des peaux. Il ne fait pas le commerce de peaux, c'est-à-dire qu'il n'achète pas de peaux dans un but de spéculation ou pour les revendre, et s'il en a acheté pour les revendre, cela est arrivé dans des cas absolument isolés, et à de longs intervalles. Ces cas ne constituent pas des actes de commerce, car pour être réputé commerçant, il faut avoir l'habitude de faire des actes de commerce, c'est-à-dire il faut une suite d'actes de même nature, dont l'ensemble constitue l'habitude d'un genre d'affaires constituant la profession.

L'intimé n'a pas d'enseigne sur sa boutique et ne s'annonce pas comme commerçant et ne recherche pas la clientèle comme vendeur de pelleteries.

Tellement que presque toujours les acheteurs de pelleteries qui s'adressent à lui sont référés au requérant cession, ou au nommé Arthur Vermette. La preuve, sur ce point, ne fait aucun doute.

La décision de ce premier point serait suffisante pour rejeter la demande de cession.

Il y a plus. La prétendue créance du requérant cession, Achille Vermette, au montant de \$803.50, se composait des items suivants, savoir : \$169.10, argent prêté; \$150. montant

d'un billet ; \$21.00 pour intérêts et \$63.50, pour marchandises consistant en pelleteries.

La preuve a démontré que le requérant cession avait déposé chez le défendeur François Vermette, une certaine quantité de peaux dont la plus grande partie y avait été transportée à titre de dépôt par le défendeur et le reste pour être repassé.

François Vermette n'a jamais refusé de remettre ou de livrer les peaux ainsi déposées chez lui au requérant cession, mais au contraire il a établi qu'en plusieurs circonstances, il avait offert de les lui rendre et remettre. Du reste, Achille Vermette a toujours prétendu, même comme témoin en cette cause, qu'il n'avait jamais cessé d'être propriétaire de ces peaux.

Il suit que le seul droit d'Achille Vermette sur ces peaux était celui de propriétaire qui lui permettait en tout temps de les reprendre, attendu que le défendeur y consentait. A défaut de ce consentement, le requérant pouvait recourir à la saisie-revendication. Il n'avait aucun droit de créance vis-à-vis de François Vermette par rapport aux peaux et ne pouvait par conséquent exiger de lui, en aucune façon, le paiement d'une somme quelconque.

La somme de \$638.50, représentant une partie de la créance sur laquelle est fondée la demande de cession doit être mise de côté.

Le billet de \$150.00 réclamé par Achille Vermette contre François Vermette n'était ni dû, ni exigible, lors de la demande de cession. Le billet dû par Achille Vermette, à l'ordre de François Vermette, était un billet de faveur pour le bénéfice de ce dernier qui en avait touché le produit et il avait été fait payable à La Banque des Marchands du Canada, à Saint Sauveur de Québec, et devenait dû le 9 novembre dernier.

La demande de cession a été signifiée le 26 octobre dernier et produite en cour le même jour.

A cette date, la demande du billet en question était prématurée, vu qu'il n'était pas échu et qu'il ne devait échoir que quatorze jours tard.

François Vermette n'avait pas perdu le bénéfice de ce terme,

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n'étant ni insolvable, ni en faillite à cette époque. Il était alors propriétaire en possession d'un immeuble valant environ \$3,500.00, de meubles de la valeur de \$500.00 et d'une créance de \$500.00, ce qui portait son actif à environ \$4,500.00. Son passif se composait : 1o.—d'une hypothèque de \$500.00 ; de comptes courants pour \$200.00 environ et d'un billet non échu de \$150.00 avec, en plus, une somme de \$45.00, dont nous parlerons ci-après, formant en tout \$895.00. Il y avait donc un excédent de \$3,705.00 de l'actif sur le passif.

Joseph Vermette n'était pas non plus en déconfiture, c'est-à-dire il n'était pas dans cet état notoire où les biens du débiteur ne suffisent pas au paiement de ses dettes. Il avait fait provision pour payer le billet et s'est rendu à la banque avec les deniers nécessaires le jour de l'échéance. Le paiement ne fut pas possible, parce que le billet avait été payé et retiré de la banque par le requérant cession, qui ne l'a jamais présenté, depuis, à François Vermette pour en être payé.

Lors de la demande de cession, François Vermette n'avait pas cessé ses paiements. Il n'y avait aucune poursuite, ni aucune saisie contre lui et il n'était pas pressé par des dettes criardes.

La seule dette qu'il devait était celle au requérant qui était débattue et fort contestable. Elle était pour argents prêtés et autres considérations au montant de \$332.62, dont il y avait lieu de déduire \$175.10, tel qu'admis par le requérant, ainsi que \$12.50 pour la valeur du repassage des peaux, ce qui laissait une balance de \$145.00 due à Achille Vermette, montant tout à fait insuffisant pour lui permettre de faire une demande de cession.

Celle-ci est donc mal fondée et, pour ces motifs, la cour la rejette et en maintient la contestation avec dépens.

L. P. Grenier, pour le requérant cession.

Rousseau & Leclerc, pour le débiteur contestant.

COUR SUPÉRIEURE.

QUÉBEC, 31 décembre 1906.

Présent :—LEMIEUX, J.PERREAULT v. LA VILLE DE LÉVIS &
FOURNIER, Intvt.

Interprétation des lois—Droit municipal—Résolution passée ultra vires—Ordre du maire d'une ville fixant les dates pour une élection—Forme de l'ordre—Document équivalent—Objections de forme—Documents municipaux—Listes électorales.

JUGÉ :—1o. La loi des cités et villes 1903 ayant pourvu (sect. 59) au remplacement d'échevins, en cas de vacance, en déléguant au maire le pouvoir de fixer les jours pour la nomination et l'élection en cas de contestation, une résolution du conseil de ville à cette fin est nulle.

2o. La résolution, quoique nulle, étant signée par le maire et suivie d'exécution sans objection de sa part, est censée ratifiée par lui et équivalant à son ordre fixant les dates qui s'y trouvent pour la nomination et l'élection. Il en est d'autant plus ainsi, que la loi dont il s'agit n'est pas impérative et, dans le silence qu'elle garde sur la manière dont le maire doit exercer les pouvoirs qu'elle lui attribue, il faut faire application de la règle de la section 9 que nulle objection à la forme ou fondée sur l'omission de formalités, même impératives, en matières municipales, n'est recevable quand il n'en résulte pas une injustice réelle.

3o. La disposition dans une loi passée pour abroger la charte d'une ville et lui appliquer la loi des cités et villes 1903, que "les règlements, "résolutions, procès-verbaux, rôles, comptes de taxes et redevances, "plans et autres actes et documents municipaux quelconques passés ou "consentis par le conseil de la ville et maintenant en vigueur, continueront à avoir leur plein effet jusqu'à ce qu'ils soient annulés, amendés, abrogés ou accomplis," comprend les listes électorales. Par suite, les listes existant lors de la passation de cette loi restent en vigueur et servent aux élections à faire, jusqu'à ce qu'elles soient remplacées par des listes en vertu de la loi des cités et villes 1903.

LEMIEUX, J. :—

Perreault, le demandeur, contribuable de la ville de Lévis, demande la cassation d'une résolution passée par le conseil de la ville de Lévis le 9 juillet 1906, décrétant la tenue d'une

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élection pour remplir la charge d'échevin ci-devant occupée par Mr Joseph Edouard Mercier et devenue vacante par un jugement de cette cour en date du 3 juillet dernier.

A cette action le demandeur a greffé une requête pour injonction interlocutoire ou intérimaire, qui a été accordée par un juge de cette cour. Cette requête pour injonction concluait de plus à ce qu'une injonction permanente ou péremptoire fut accordée enjoignant à la ville de Lévis et à son conseil de ne pas procéder à l'élection. La ville s'en est rapportée sur le tout à justice.

L'action du demandeur s'appuie sur trois motifs différents de nullité :—

10.—Le maire et non le conseil aurait droit d'ordonner telle élection et d'en fixer la date.

20.—Aucune disposition de la loi n'autorisait la tenue de telle élection.

30.—Aucune liste électorale n'existait en vertu de laquelle l'élection pouvait être faite.

L'acte 6 Edouard VII, chapitre 49, a refondu et révisé la charte de la ville de Lévis, et a décrété (section 4) que la ville de Lévis serait à l'avenir soumise aux dispositions de la loi des cités et villes de 1903, sauf en autant qu'elles sont incompatibles avec les dispositions de la présente loi.

Cette section 4 ajoute que la loi constitutive de la ville de Lévis, 36 Vict., chap. 60, et les lois qui l'amendent étaient abrogées.

L'acte originaire et constitutif de la ville de Lévis donnait au conseil les droit et privilège de fixer la date d'une élection partielle devenue nécessaire par une vacance dans le conseil. Le nouvel acte régissant la ville de Lévis a établi un nouvel état de choses et a prescrit (section 59) que s'il survient une vacance dans la charge d'échevin, le maire fixera dans les huit jours qui suivent telle vacance un jour pour la nomination des candidats, ainsi que pour l'élection en cas de contestation, laquelle élection doit avoir lieu dans les trente jours qui suivent la vacance.

La raison de donner au maire, au lieu du conseil comme ci-

devant, le droit et le pouvoir de fixer la date de telle élection partielle, est que la convocation du conseil peut ne pas avoir lieu dans les trente jours après la vacance du siège, soit pour défaut de quorum ou pour d'autres raisons. Tandis que le maire ou le pro-maire seront toujours disponibles pour exécuter la loi avec plus de sûreté.

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Le statut a donc désigné le maire comme l'officier ministériel pour la fixation de l'élection, et lui seul peut valablement exercer ce droit, et donner pareil ordre.

On nous a représenté qu'aucun inconvénient ou préjudice ne pouvait résulter de la fixation de la date de l'élection soit par le conseil, soit par le maire.

En effet, les raisons du préjudice ou d'inconvénient ne sont pas très sensibles. Mais il est de doctrine de conserver les pouvoirs publics dans les limites exactes des pouvoirs délégués par le parlement.

Puis, l'illégalité et la nullité comportent l'idée de préjudice.

Or, il est évident, dans la présente espèce, que le conseil a exercé un pouvoir et a adopté une procédure que la loi pour des raisons d'intérêt public a confiées au maire seulement. En agissant, ainsi qu'il l'a fait, le conseil s'est arrogé une quasi-prérogative dont le maire seul est investi.

Partant, la partie des conclusions de l'action demandant l'annulation de la résolution devrait être accordée. Mais le débat ne s'arrête pas là. Il s'agit en outre de savoir si le demandeur a en outre le droit d'obtenir, ainsi qu'il a conclu par sa requête pour injonction, une injonction péremptoire ou permanente enjoignant à la ville de ne pas procéder à l'élection. En d'autres termes, le tribunal peut-il confirmer l'injonction interlocutoire décernée contre la ville ? La résolution du conseil fixant l'élection est illégale, il est vrai, mais cette illégalité enlève-t-elle à cette procédure municipale le caractère d'un ordre du maire fixant l'élection, tel que requis par la loi ? La loi dit que l'élection sera fixée par le maire, mais n'exprime pas comment et de quelle manière le maire procèdera à la fixation de l'élection.

Doit-il donner un ordre par écrit ou verbal, à cet effet, au

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secrétaire de la municipalité ? Le statut est silencieux sur ce sujet.

Nous serions disposés à interpréter la loi comme permettant au maire de donner l'ordre, de quelque manière que ce soit, verbalement ou par écrit.

Dans le cas qui nous occupe, une résolution a été présentée au conseil présidé par le maire, à l'effet de fixer la date de l'élection. Le maire ne s'est pas opposé à, ni protesté contre cette résolution. Au contraire, il l'a signée, ainsi que le procès-verbal de la séance.

Si l'ordre du conseil fixant l'élection ne convenait pas au maire, il aurait pu, le lendemain, donner un ordre contraire. Il n'en a rien fait. Il a ratifié le tout et par son silence, et aussi par un acte positif, c'est-à-dire par la signature du procès-verbal et de la résolution.

En conformité à l'ordre reçu, le secrétaire de la municipalité a donné des avis publics pour une élection qui devait avoir lieu le 6 août dernier. Le maire est présumé et comme maire et comme contribuable, avoir eu connaissance de ces avis, auxquels il a acquiescé par sa non-intervention.

La résolution du conseil, toute nulle qu'elle fût, pouvait comporter un avis ou une suggestion au maire quant à la fixation de l'élection. Cette résolution était l'acte conjoint du maire et du conseil.

L'acte du conseil peut être nul, mais n'invalide pas celui du maire. Si l'acte du conseil disparaît, celui du maire peut rester. On pourrait, à la rigueur, appliquer la règle qui veut que si une pièce ou un document comporte une clause, ou disposition nulle, cette disposition sera écartée, mais n'entachera pas de nullité la partie de l'acte qui est valable.

Nous trouvons dans cette résolution fixant l'élection, faite sous les regards du maire, signée et ratifiée par lui, et suivie d'exécution, l'expression formelle de la volonté et de l'intention du maire de fixer l'élection à la date du 28 juillet et du 6 août. Ce que la loi veut, d'une manière absolue et impérative, c'est l'élection dans les trente jours de la vacance du siège municipal, afin que le corps municipal soit au complet et que les intérêts

des contribuables soient fidèlement représentés.

Ce que la loi requiert, c'est un jour fixé et déterminé pour l'élection, et les avis publics de cette élection, afin que les électeurs aient le temps de se renseigner sur le programme, la compétence ou la valeur morale des candidats qui briguent les suffrages.

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Or, nous nous demandons, en vain, en quoi et comment les électeurs pouvaient être frustrés dans l'exercice plein et entier de leur droit de vote, en quoi et comment ils pouvaient être gênés ou molestés, ou privés de leurs droits d'électeur dans une élection fixée à un jour déterminé, après avis donné, dans les circonstances relatées.

La fixation de la date d'une élection est une chose impérative, mais le mode de procéder à cette fixation n'est seulement que *directory*, suivant l'expression doctrinaire, et n'est qu'énonciative, ou indicative, non pas d'une forme essentielle ou substantielle, mais d'une forme accidentelle, dont l'inobservation n'a pas été décrétée être une cause de nullité par la législation. Voir Laurent, Vol. 1, p. 102, No 67. 1o Aubry et Rau, No 37, pp. 118, 119, 120, 121, 122 et 123.

Endlich, No 437, p. 621 : " In general, statutes directing
" the mode of proceeding by public officers are deemed adviso-
" ry, and strict compliance with their detailed provisions is
" not indispensable to the validity of the proceedings themself-
" ves, unless a contrary intention can be clearly gathered from
" the statute construed in the light of other rules of interpre-
" tation."

Potter's Dwarries on Statutes, pp. 222 : "A statute direc-
" ting the mode of proceeding by public officers, is to be deem-
" ed directory, and a precise compliance is not to be deemed
" essential to the validity of the proceedings unless so decla-
" red by statute."

Idem, 2, p. 224 : "The true distinction is this: where the
" provision of the statute is the essence of the thing required
" to be done, and by which jurisdiction to do it is obtained,
" it is mandatory; otherwise when it relates to form and
" manner, and where an act is incident, or after jurisdic-

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"tion has been obtained, it is directory... A statute directing the mode of proceeding is directory, and not to be regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute."

Les Commissaires d'Ecole vs Paquet (1)

Mais nous avons quelque chose de supérieur à la doctrine : nous avons un texte de loi qui fait partie de la charte de Lévis, sect. 9 de l'acte des cités et villes qui rend facile l'application des lois municipales et qui les soustrait à toutes objections et exceptions qui ne causent pas de préjudice : quelle objection faite à la forme, dit le statut, ou fondée sur l'omission de formalités même impératives n'est recevable sur action ou poursuite concernant les matières municipales, à moins qu'une injustice ne résulte de rejet de cette objection ou à moins que d'après les dispositions de la présente loi, l'omission de ces formalités ne frappe de nullité les procédures ou autres actes municipaux qui doivent en être revêtus.

Nous concluons donc sur ce point que la résolution du conseil de la ville de Lévis, à laquelle le maire a participé en la manière ci-dessus rapportée, comportait un ordre légal de la fixation de l'élection, et que l'exécution de cet ordre légal ne pouvait causer en aucune manière, préjudice aux contribuables ou électeurs de Lévis, surtout après les avis requis eussent été donnés.

Deuxième moyen du demandeur. Le demandeur prétend que l'élection n'était pas possible vu qu'il n'y avait pas de liste électorale en force pouvant servir à l'élection, et il formule son objection comme suit : la loi pourvoit à la création, chaque année, d'une liste des électeurs devant servir à toutes élections générales ou partielles, et telle liste n'existe pas.

A ce grief le demandeur en a ajouté un autre, qui consiste à dire que le mode d'élection suivi d'après l'ancienne loi a été aboli, et que le nouveau mode prescrit par l'acte des villes et cités 1903, n'était ni praticable, ni possible.

Nous croyons que les sections 5 et 8 de la nouvelle charte

(1) C. S. R. 310.

de Lévis contiennent des dispositions qui réfutent entièrement ces prétentions.

En effet, la section 8 dit : les règlements, résolutions, procès-verbaux, etc, etc et autres documents quelconques (la version anglaise dit *whatsoever*) passés ou consentis par le conseil de la ville de Lévis maintenant en vigueur, continueront à avoir leur plein effet jusqu'à ce qu'ils soient annulés, amendés, abrogés ou accomplis.

L'expression générale "tous les documents et actes municipaux quelconques de la ville de Lévis resteront en force," rendait inutile l'énumération ou la nomenclature des différentes espèces de documents municipaux de la ville de Lévis qui devaient rester en force.

Ces expressions disaient et voulaient dire que tous les actes et documents municipaux généralement quelconques resteraient en force, et incluaient les listes électorales alors en vigueur. Car les listes électorales constituent non seulement une procédure municipale, mais en outre un des actes municipaux les plus nécessaires à l'existence ou au maintien intégral du corps municipal, et les listes électorales devaient nécessairement être incluses parmi les documents et actes municipaux dont la loi parle. Si la loi a pris la peine de parler de comptes de taxes et redevances, de plans, etc, et de dire qu'ils resteraient en force, à *fortiori* la législature a dû être assez sage pour conserver à la ville de Lévis les listes électorales qui lui permettaient de combler les vides qui pourraient avoir lieu dans son conseil.

Les fins des dispositions des statuts sont réputées être de remédier à quelque mal ou de produire quelque bien, soit que la loi commande ou défende de faire un acte qu'elle considère avantageux ou nuisible à l'intérêt public, ou qu'elle inflige une punition aux contrevenants.

Tel statut doit recevoir une interprétation large et libérale propre à assurer l'accomplissement de son objet et l'exécution de ses prescriptions suivant leur véritable sens, esprit et intention, tel qu'enseigné par la section 13 de l'acte des dispositions déclaratoires et interprétatives des statuts.

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Or, si le but de la loi est de remédier à un mal ou de produire un bien, et si toute loi doit recevoir une interprétation libérale comme nous venons de le dire, nous concluons sans hésitation que les mots : Et autres documents municipaux quelconques incluent et comprennent les listes électorales, et que ces listes devaient rester en force jusqu'à ce qu'elles fussent remplacées par d'autres listes faites en vertu de la nouvelle loi.

S'il en était autrement, la législature aurait créé un mal, et aurait privé les contribuables des lumières et des secours qu'elle a droit d'attendre de un ou de plusieurs représentants dans le conseil.

Nous trouvons une autre réfutation des prétentions du demandeur sur ce point dans la section 5 de la nouvelle charte qui a édicté que la corporation constituée par la nouvelle loi succède aux droits, privilèges, obligations, etc, etc, de la corporation existant, en vertu de lois abrogées, si la corporation nouvelle, ou la corporation de Lévis succède aux droits, privilèges et obligations de l'ancienne corporation, elle avait donc droit de se servir des anciennes listes électorales, et aussi de faire cette élection partielle suivant l'ancien mode, au cas où il n'y aurait pas eu de nouvelles listes, et que le mode nouveau n'aurait pas été praticable. Pour ces motifs, nous concluons donc que la résolution du conseil fixant la date de l'élection doit être annulée, et que l'action qui demande la cassation de la dite résolution doit être maintenue avec dépens.

Mais nous concluons de plus que l'ordre donné par le maire pour la convocation de l'élection, était légal, et que l'exécution de cet ordre était aussi légal, et que l'injonction interlocutoire adressée à la corporation, au conseil et à ses officiers de ne pas procéder à l'élection, ne peut être confirmée et que les conclusions de la requête pour injonction péremptoire doivent être rejetées.

Belleau, Belleau & Belleau, pour le demandeur.

Chas. Darveau, C. R., pour la défenderesse.

Alphonse Bernier, C. R., pour l'intervenant.

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ALIMENTS :—1o. Les aliments ne sont exigibles que dans la mesure des facultés de celui qui les doit. Par suite, le mari infirme et incapable de gagner sa vie, condamné par sentence de séparation de corps à payer quatre piastres par mois d'aliments à sa femme n'est pas tenu de les prélever sur une rente viagère annuelle de \$150 son unique ressource et qui ne suffit pas à le faire vivre.

2o. Une rente viagère léguée sous condition d'insaisissabilité ne peut être saisie pour une dette alimentaire due à une tierce personne.—*Dupuis v. Viau & De guise et al.*, C. R., Taschereau, Pagnuelo et Saint-Pierre, JJ., 391.

ASSURANCE CONTRE LE FEU :—A contract of insurance of movables in favour of a husband who represents himself to the insurer as the owner of them, whereas they belong to his wife, is null and void for false representation.

Quare, has the husband, on a true representation of the facts, an insurable interest in the property of his wife on which to found a valid contract of insurance.—*Lemieux v. La Compagnie Equitable d'Assurance contre le feu*, C. S., Curran, J., 490.

ASSURANCE SUR LA VIE :—1o. When a policy of life insurance provides for a benefit to the insured or his representatives upon *surrender* of the policy, such a surrender means a giving up of the policy with an express or implied consent that it be cancelled. The deposit of the policy in the hands of the insurer for the purposes of a loan will not avail as a surrender under the covenant.

2o. When it is provided in a policy that after the insurance has been maintained for two years, if it lapses by non payment of the premium and application is made within six months thereafter, a benefit will still accrue, at the death of the insured, to his representatives, and the insured dies and his representatives apply for payment of the insurance within six months of the lapse thereof, such an application is sufficient to entitle them to the benefit of the proviso, though not made specially therefor.—*Beaudette v. The Provident Savings Life Ass. Society of New York*, C. S., Saint-Pierre, J., 160.

BAIL À FERME :—A covenant in a lease of a farm that the lessor will contribute one half the expense of feeding the stock and that the latter, as it becomes unproductive, will be renewed by sale and purchase, will, in case of breach by the lessor, give the lessee a right of action to be allowed to carry it out at the cost of the lessor.—*Laurin et al. v. Meunier dit Lagacé*, C. S., Archibald, J., 78.

10. A lease of a farm for a share of its produce and an undertaking by the lessee to pay the lessor one half the value of the stock and agricultural implements on it, partakes of the nature of a partnership and is essentially a contract *bonæ fidei*. In adjudicating upon a demand by lessor based upon charges of neglect and of maladministration by the lessee the Court has a full discretionary power in its appreciation of the facts to declare whether the case comes within any of the provisions of Art. 1624 C. C., as to rescission.

20. While the failure of the lessee to carry out the stipulations of the lease entitles the lessor to ask for its rescission when it is of a grievous character, the Civil Code provides another remedy for acts of negligence or omissions which are involuntary rather than the result of incapacity or of a refusal to perform the obligations of the lease.—*Meunier dit Lagacé v. Laurin et al.*, C. S., Archibald, J., 68.

BAIL À LOYER :—10. Une convention entre un bailleur et un preneur que le bail sera continué pendant un nombre d'années, à condition que le preneur construise à la satisfaction du bailleur une addition à l'immeuble loué, crée des droits et obligations réciproques qui sont la considération les uns des autres. Par suite, le bailleur refusant de continuer le bail sous le prétexte que l'addition n'a pas été construite par le preneur à sa satisfaction, ne peut en même temps la retenir sans indemnité. La convention restant inexécutée, les parties retombent sous le droit commun qui ne permet au bailleur de retenir les additions faites par le preneur qu'en en payant la valeur.

20. Lorsque l'addition qui fait l'objet d'une telle convention est d'une valeur excédant \$50. la preuve testimoniale est inadmissible pour établir qu'elle a été construite à la satisfaction du bailleur.—*Lee Chu v. Deslauriers*, C. R., Pagnuelo, Paradis et Lafontaine, J.J., 494.

An action by a lessee will lie to rescind the lease of a dwelling previously occupied as a brothel and in close proximity to two other houses the property of the lessor actually leased and occupied for similar purposes, in consequence of which the lessee and his family are molested, insulted and troubled by frequenters of such resorts, in their enjoyment of the premises leased.—*Levin v. Lalande et vir*, C. S., Dunlop, J., 481.

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COMPAGNIES À FONDS SOCIAL (POUVOIR DES) :—1o. A company whose charter provides that it "may acquire, own, lease and sell "real estate", and "build, sell, lease and otherwise deal with elevators, etc," and further "may issue bonds bearing interest to an amount not exceeding the cost of any elevator built by it," has the power to issue such bonds for the price of an elevator bought by it.
2o. A guarantee of bonds issued by a company for the price of an elevator, given by a Railway Company to which the elevator is leased and amounting in effect to an undertaking to pay the rent to a trustee for the bondholders, is valid and binding and may be enforced against such Railway Company. *The Royal Trust Co. v. The Great Northern Elevator Co.*, C. R., Sir M. M. Tait, A. C. J., Taschereau & Paradis, JJ., 499.

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CONTRAT :—The assignee of a contract for the supply of goods who undertakes to carry it out and to pay a commission to the assignor is liable for commission on goods rejected as not being of the quality required by the contract.—*The J. N. Ashdown Hardware Co. Ltd v. Dillon et al.* C. R., Sir M. M. Tait, A. C. J., Loranger & Hutchinson, JJ., 440.

A party who contracts for the manufacture of machinery and afterwards notifies the manufacturer that he will not accept delivery of it, unless certain guarantees respecting it not mentioned in the contract, be given him, is thereby held to repudiate the contract and becomes liable for the price of the machinery, less whatever value it may have for the manufacturer.—*Morgan-Smith et al. v. The Montreal Light, Heat & Power Co.*, C. S., Dunlop, J., 242.

An agreement by which the maker of a note undertakes, in case it is not paid at maturity, to transfer to the payee, as security, certain specified movables of which he retains the possession in the mean time, does not give the payee the right to revendicate the movables after the note falls due and remains unpaid. The proper remedy in such a case is a personal action for breach of contract. *Savard v. Tremblay*, C. S., Saint-Pierre, J., 423.

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CONTRAT D'ÉCHANGE :—1o. When one of the parties to an exchange of immovable properties is not the owner of that which he offers to give, the contract is conditional and can only be enforced by him when he has fulfilled the condition, i. e., when he has become the owner of the property.

2o. When one party to an exchange has performed his part of the contract by signing the requisite deed to effect a conveyance of the property given by him, and notifies the other to do the same, as to his part, within a delay after which his failure to do so will be taken as a resiliation of the contract, and the latter party first refuses to carry out his undertaking and afterwards pretends his refusal was due to error, and takes steps to carry out the contract, but without putting himself in a position to do so effectually, such conduct will amount to an implied concurrence in the notice of resiliation given by the first party.—*Blanchard v. Walker*, C. S., Doherty, J., 171.

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CHEMINS (ENTRETIEN DES) :—Les municipalités rurales qui, dans la construction et l'entretien des chemins n'observent pas les prescriptions de la loi touchant l'égouttement des eaux (*dans l'espèce, faire des fossés latéraux*) sont responsables des dommages qui en résultent aux terres riveraines.—*Thérien v. La Corporation du Canton de Windsor*, C. S., Lemieux, J., 24.

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CHEMIN PUBLIC :—A road originally opened as a private road on private property will not be presumed to have become a public road in the possession of the municipality in which it lies, merely because the owner has allowed the public the use of it for six years without objection. The municipal corporation cannot therefore proceed *en complainte* against the owner who closes the road.—*The Corporation of the Township of Onslow v. McGouch*, C. R., Taschereau, Pagnuelo et Charbonneau, J.J., 256.

ÉLECTION DES CONSEILLERS DE VILLE :—Les signatures sur le bulletin de nomination d'un candidat à une élection de conseillers pour une ville doivent être certifiées ou attestées par *affidavit* et le président de l'élection peut ajourner la proclamation du candidat élu pour lui permettre d'accomplir cette formalité. Par suite, cet ajournement ne saurait être pris pour un refus de proclamer qui donne ouverture au recours du *mandamus* contre le président.—*Manseau v. Mercure*, C. S., Malouin, J., 153.

INTERPRÉTATION DES LOIS :—10. La loi des cités et villes 1903 ayant pourvu (sect. 59) au remplacement d'échevins, en cas de vacance, en déléguant au maire le pouvoir de fixer les jours pour la nomination et l'élection en cas de contestation, une résolution du conseil de ville à cette fin est nulle.

20. La résolution, quoique nulle, étant signée par le maire et suivie d'exécution sans objection de sa part, est censée ratifiée par lui et équivaut à son ordre fixant les dates qui s'y trouvent pour la nomination et l'élection. Il en est d'autant plus ainsi, que la loi dont il s'agit n'est pas impérative et, dans le silence qu'elle garde sur la manière dont le maire doit exercer les pouvoirs qu'elle lui attribue, il faut faire application de la règle de la section 9 que nulle objection à la forme ou fondée sur l'omission de formalités, même impératives, en matières municipales, n'est recevable quand il n'en résulte pas une injustice réelle.

30. La disposition dans une loi passée pour abroger la charte d'une ville et lui appliquer la loi des cités et villes 1903, que "les "règlements, résolutions, procès-verbaux, rôles, comptes de taxes "et redevances, plans et autres actes et documents municipaux "quelconques passés ou consentis par le conseil de la ville et maintenant en vigueur, continueront à avoir leur plein effet jusqu'à "ce qu'ils soient annulés, amendés, abrogés ou accomplis," comprend les listes électorales. Par suite, les listes existant lors de la passation de cette loi restent en vigueur et servent aux élections à faire, jusqu'à ce qu'elles soient remplacées par des listes en vertu de la loi des cités et villes 1903.—*Perreault v. La Ville de Lévis & Fournier*, *intvl*, C. S., Lemieux, J., 537.

INTERPRÉTATION DES STATUTS :—10. Where a county municipa-

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lity took stock and became a shareholder in a Railway Company under a by-law that provided for effecting a loan to pay for the stock, under the 16th Vict. chapters CXXXVIII and CCXIII, and ceased to exist by operation of the 18th Vict. cap. C., and its property, debts, contracts, liabilities, powers and duties were vested in and laid upon a new county municipality created by the same statute, with a proviso that the new municipality should have a recourse to recover "from any other county within the limits of which " any part of the municipality ceasing to exist was situate, a share " of any sum paid in discharge of any such a *debt* proportionate to " the population of such part of such municipality as compared " with the whole population thereof", this proviso does not apply to monies paid by the new municipality on account of the shares held by it in consequence of the subscription made by the old municipality as stated above. Hence, the township of Brome and the east part of Farnham forming part of the county of Shefford until the 1st of July 1855, and having from that date, under 18th Vict. cap. C., become part of the county of Brome, the latter did not become liable to the new county of Shefford created by the same statute on that date, for any proportion of monies paid by it in carrying out a subscription of the former county of Shefford for stock in a railway company, made by a by-law of the 22nd Septem brr 1853.

20. A by-law passed under the 16th Vict. cap. CCXIII which did not provide for a special rate to meet interest and a sinking fund was nevertheless valid if approved by the Governor General, under 18th Vict. cap. XIII, ss. 5 and 6, and is no longer open to attack on the ground of the omissions and informalities in question.

30. Credit given by the government in the accounts of the Receiver General to a county for a sum as due to it under the 22 Vict. cap. XLVII, s. 21 and cap. XV, s. 5, is not of itself evidence that it was retained in discharge of a *debt* under the proviso above cited of 18th Vict. cap C., s. 37, s. 5, the *onus* of proof that the credit and entry thereof is connected with such a debt is on the party alleging it.

40. The recourse given by the proviso is against *the county* in which the part of the county ceasing to exist is situate and not against the townships or local municipalities forming such part. An assignment of the recourse purporting to be against the townships or local municipalities is therefore void under the statute and gives no right of action against the county in which they lie.—*Auger v. The Corporation of the County of Brome*, C. S., Doherty, J., 446.

A provision in a city charter that one half of the cost of certain improvements shall be levied upon a class of tax-payers by *ten annual instalments* is not impliedly repealed, as to the division of

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the assessment into instalments, by a subsequent statute which alters the proportion of the amount to be levied from one half to three eighths without mention of the mode of payment.—*The City of Montreal v. The Estate of D. Milligan & De J. Sullivan, opp.*, C. S., Archibald, J., 394, V. 427.

RÈGLEMENT ULTRA VIRES.

LISTE ÉLECTORALE :—V. INTERPRÉTATION DES LOIS, 537.

RÈGLEMENT ULTRA VIRES :—10. A by-law of the city council of Montreal ordering all shops to be closed at seven o'clock in the evening on Wednesday and Thursday evenings each week and to remain so closed until five o'clock the next morning, is not founded on, nor authorized by the common law power vested in municipalities to make police and other regulations for good government and the maintenance of public order within their limits. Nor does the section 140 the "good government clause," of the charter of the City of Montreal confer upon its council the power to make such a by-law.

20. An enactment by the Legislature of the Province of Quebec giving municipal councils in cities and towns the power to pass by-laws for the closing of shops of one or more categories during certain prescribed hours of the day does not fall under any of the heads enumerated in section 92 of the British North America Act and is therefore unconstitutional.

30. Even if the above enactment was constitutional as it enables councils to pass by-laws only in reference to stores of one or more categories a by-law passed for the closing of all stores does not conform to it and is therefore *ultra vires*.—*Beauvais et al. v. The City of Montreal*, C. S., Archibald, J., 427.

10. Un règlement municipal qui assujettit la possession et l'usage d'une machine automatique (*slot machine*) à l'obtention d'une licence moyennant un droit en argent, ne peut être valablement fait en vertu d'une loi qui donne à la municipalité le pouvoir de soumettre à cette obligation l'exercice d'un métier, industrie ou genre d'affaires. Ce règlement est partant *ultra vires* et nul.

20. Est nul un règlement municipal qui impose un droit sans tenir compte du mode d'imposition prévu dans la loi en vertu de laquelle il est passé.

30. La prescription de trois mois des demandes d'annulation des règlements prévue à l'art. 304 de la charte de la cité de Montréal ne s'applique qu'aux cas de nullité relative et non aux cas de nullité absolue où l'on peut dire d'un règlement qu'il est inexistant. *Bell Telephone Co. v. Cité de Montréal*, C. S., Mathieu, J., 157.

DROIT MUNICIPAL—*Suite*.

10. While a municipal corporation may, like any other person, seek redress by action before the Courts of a specific wrong done it, in violation of the law, the Courts have no jurisdiction, in the absence of such a wrong, to deal with a demand upon them by such a corporation to restrain breaches of its by-laws, or to authorize it to prevent them by physical means.

20. The Superior Court has jurisdiction of actions to recover penalties imposed by municipal by-laws, when of an amount of one hundred dollars in Montreal and Quebec and of two hundred dollars in the other districts.

30. A municipal by-law which imposes a fine and imprisonment in default of payment does not conform to the law which authorizes the imposition of a fine not exceeding a given sum, or an imprisonment not exceeding a given number of days; it is therefore null and void and cannot be enforced by action. *The Corporation of the Parish of St Laurent v. Roy*, C. S., Doherty, J., 333.

RÉSOLUTION ULTRA VIRES :—*V. INTERPRÉTATION DES LOIS*, 537.

RESPONSABILITÉ :—Les municipalités, en exerçant le droit de fermer les rues ou voies publiques, sont responsables des dommages causés aux propriétaires riverains par la plus grande difficulté d'accès à leurs immeubles.—*The Montreal Brewing Co. v. La Cité de Montréal & La Cie du chemin de fer du Pacifique*, C. S., Fortin, J., 280.

Lorsque les règlements d'une ville imposent à ceux qui veulent y construire des édifices l'obligation préalable de faire fixer par ses officiers le niveau et l'alignement suivant lesquels les fondations doivent être posées, une erreur dans les chiffres et les indications fournis par ces officiers engage la responsabilité de la ville pour les dommages qui en sont la suite immédiate et directe.—*Dubois v. La Ville Saint-Louis*, C. R., Sir M. M. Tait, A. J. C., Mathieu & Pagnuelo, JJ., 289.

ROLE D'ÉVALUATION :—10. Notice of the deposit of a valuation roll, under art. 732 M. C., and of its revision by the Municipal Council, under art. 736, may be given simultaneously by one and the same document, no interval of time being required to lapse between the two.

20. Municipal Councils in revising valuation-rolls have a discretion with which the Courts will not interfere by the exercise of their reforming power except in cases of evident injustice amounting to oppression.—*Ledoux v. La Municipalité du Canton de Ste Edwidge de Clifton*, C. S., Hutchinson, J., 29.

ELECTIONS CONTESTÉES (ACTE DES) :—When an order was made

ELECTIONS CONTESTÉES (ARTICLES)—*Suite.*

by a judge for the service of an election petition "on the defendant
 " in person or at his domicile or at the place of his ordinary resi-
 " dence, speaking to a reasonable person belonging to the family of
 " the defendant or by posting in a conspicuous place on the residen-
 " ce of the defendant, in the presence of a witness, the election pe-
 " tition and proceedings attached thereto," a service effected at the
 residence of the defendant's father where his wife and children were
 temporarily residing, the defendant's house in which he had lived
 during the eight previous years not having been closed, is not in-
 compliance with the order and on preliminary objection made there
 to will be declared null and void :—*Wetherall v. Hunt*, C. S., Hut-
 chinson, J., 32.

ENREGISTREMENT :—10. Le vendeur d'un immeuble, comme garant de
 son acheteur, est une partie intéressée au sens de l'art. 2149 C. C.
 Il a donc qualité pour poursuivre la radiation d'un enregistre-
 ment hypothécaire nul ou irrégulier sur l'immeuble vendu.

20. Le défendeur ne peut pas opposer à cette poursuite que
 l'acte enregistré ne crée pas d'hypothèque ; dès que l'enregistrement
 existe la partie intéressée a droit à sa radiation. *Cotnoir v. Brisson*,
 C. S., Malouin, J., 508.

EXTRADITION ACT :—V. PROCÉDURE, VO HABEAS CORPUS, 363.

FRAUDE :—V. PROCÉDURE VO INTERVENTION, 166.

GAGE :—The pledgee who is authorized by the contract to dispose of the
 thing pledged in default of payment of the debt and to apply the
 proceeds thereto, can only do so by a public sale duly advertized.
 Where a number of shares in a joint stock company were pledged
 with the above covenant, a sale of them by auction, at which the
 pledgee bought them for less than their value, of which notice was
 given by private circular to the other shareholders of the Company
 only, was not such a "disposing" of them as was intended by the
 contract.—*Campbell et al. v. Beyer et al.*, C. R., Sir M. M. Tait, A.
 C. J., Robidoux & Paradis, JJ., 86.

GARANTIE :—V. SOCIÉTÉ COMMERCIALE, 137.

GARANTIE CONTRE TROUBLE D'ÉVICTION :—V. VENTE IMMOBI-
 LIÈRE, 447.

GARANTIE DE FOURNIR ET FAIRE VALOIR :—V. MANDAT, 9.

HUSBAND AND WIFE :—V. PROCÉDURE, VO EXÉCUTION DES JUG-
 MENTS, 321, MARI ET FEMME, 556.

IMPUTATION DE PAIEMENTS :—Les règles sur l'imputation des paiements tracées par le Code Civil ne sont pas applicables aux comptes courants commerciaux.

Parsuite, le tiers qui a souscrit un billet de faveur dont le montant forme partie d'une dette résultant d'un compte courant est obligé à la garantie du paiement du solde définitif jusqu'à concurrence du montant du billet sans qu'il puisse prétendre que les premiers paiements qui ont suivi l'échéance ont éteint cette partie de la dette.—*Rousseau v. Mancotta, C. R., Routhier, J. C. Sup., Larue & Lange-lier, J.J., 175.*

The debtor who owes two or more debts to the same person, may pay in full any one of them he chooses and so extinguish it, but he cannot compel his creditor to impute on any one of them specially, a payment that is only a part satisfaction of it. The ordinary rules as to the imputation of payments take effect in such a case.—*Kent et al v. Brosseau, C. R., Sir M. M. Tait, A. C. J., Taschereau et Pagnuelo, J.J., 443.*

INTERPRÉTATION DES CONVENTIONS :—*V. BAIL À LOYER, 494, VENTE À RÉMÉRÉ, 514, VENTE SOUS CONDITION RÉSOŁUTOIRE, 58.*

INTERPRÉTATION DES LOIS :—*V. DROIT MUNICIPAL, VO INTERPRÉTATION DES LOIS, 537.*

INTERPRÉTATION DES STATUTS :—1o. A clerk in Holy Orders of the Church of England appointed by the Lord Bishop of Montreal under his sign manual to be the incumbent of a parish during the pleasure of His Lordship, and therefore removable, is the *Incumbent* within the meaning of Section 6 of the Temporalities, Act of the United Church of England and Ireland in the Diocese of Montreal. As such, he forms, with the churchwardens of the parish, the corporation referred to in the above section.

2o. An incumbent of a parish need not be a Rector. He holds his office by virtue of his appointment by the Lord Bishop of the diocese and neither "institution" nor "induction" is required to invest him with the rights and powers pertaining to it.—*The Incumbent & Churchwardens of St. Edward's Church v. The Synod of Montreal, C. S., Dandoy J., 265 V. DROIT MUNICIPAL VIS INTERPRÉTATION DES STATUTS, 394, RÈGLEMENT ULTRA VIRES, 427.*

JOINT STOCK COMPANIES :—*V. COMPAGNIES À FONDS SOCIAL.*

LEASE :—*V. BAIL À LOYER.*

LEGS SOUS CONDITION D'INSAISSABILITÉ :—*V. ALIMENTS, 391.*

LÉSION :—A subscription by a minor to the capital of a joint stock com-

LÉSION—Suite.

pany, however flourishing, is annulable for lesion, if the payments that may be required under it exceed the means of the subscriber. *Bernard & Co. v. J. A. Hurteau & Co. (Limited)*, C. R., Sir M. M. Tait, A. C. J., Archibald et Paradis, JJ., 184.

LIABILITY FOR TORT :—V. RESPONSABILITÉ.**LIBELLE DANS UNE PROCÉDURE :—V. RESPONSABILITÉ, 188.**

LICENCES (LOI DES) :—1o. La question de savoir si une opposition écrite à la confirmation d'un certificat, pour l'obtention d'une licence est formée ou non par la majorité des électeurs prévue par la loi est une question de fait dont les conseils municipaux sont les juges souverains. Par suite, la solution négative qu'ils adoptent ne donne pas ouverture à l'action en cassation pour cause d'illégalité de l'art. 23 de la loi des licences, modifiée par la 3^e Ed. VII, Cap. XIII, s. 3.

2o. Un conseil municipal est fondé à retrancher en bloc de l'opposition écrite à trois certificats, les signatures de tous ceux qui ont préalablement signé ces certificats, et n'est pas tenu de faire une élimination particulière pour chacun d'eux des signatures qui y figurent en même temps que sur l'opposition.—*Brunelle v. La Corporation du Village de Princeville*, C. S., Malouin, J., 19.

LOUAGE D'OUVRAGE :—1o. A driver employed by a laundryman to deliver laundry to customers, is not liable for credit given them, when it is established that all the drivers in the same employ were in the habit of doing so to the knowledge of their employer.

2o. The driver has the right to take credit for sums paid by him to customers for goods lost and due them by his employer. *Shovelin et vir v. Hanson*, C. R., Archibald, Robidoux et Paradis, JJ., 360.

MANDAT :—1o. Le notaire à qui une cliente confie le montant d'un prêt pour le remettre à l'emprunteur, agit comme mandataire *ad negotia* et comme mandataire salarié, lorsqu'il partage avec le notaire de l'emprunteur la commission usuelle prélevée sur l'emprunt. Dans l'exécution de ce mandat, en versant les fonds entre les mains d'un autre que l'emprunteur même, notamment du notaire de ce dernier il se substitue cette personne et est responsable des pertes provenant de son fait.

2o. Le prêteur qui cède à un tiers avec garantie de fournir et faire valoir une créance qu'il croit réelle, mais qui n'est en réalité que fictive, ne renonce pas par là aux recours qu'il peut avoir contre ceux par le fait desquels cette créance a été contractée fictivement et qui sont la cause du remboursement qu'il a dû en faire à

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son cessionnaire.—*Aud v. Chaurest*, C. R., Pagnuelo, Robidoux & Paradis, JJ., 9.

A party dealing with an agent is put upon inquiry to ascertain the extent of his powers, and when his authority to sign cheques or notes is limited "to a certain business," his principal is not liable for those given or subscribed by him and of which he has misapplied the proceeds. Cf. *La Granda Hermanos Y Ca v. The American Electrical and Novelty Mfg Co.*, 29 S. C., 444.—*La Banque du Peuple v. Bryant et al.*, 17 Q. L. R., 103.—*Vigaud v. De Werthemer*, Saint Pierre, J., 229.

MARI ET FEMME :—Le "concours du mari dans l'acte" exigé par l'article 177 C. C. pour rendre valide l'aliénation de ses biens par la femme doit s'entendre dans le sens vulgaire et ordinaire du mot. Par suite, une vente d'immeuble faite par une femme mariée seule, quoique son mari qui se trouvait dans une pièce voisine séparée par une mince cloison, ait entendu tout ce qui se passait, est nulle. Cette nullité étant absolue, tous ceux qui y ont un intérêt né et actuel peuvent s'en prévaloir, entr'autres, celui à qui la prétendue vente a été faite.—*Fournier et vir v. Grégoire*, C. S., Langelier, J. C. Sup., 527.

10. A covenant in a contract of marriage that "the husband, in consideration of the renunciation of legal dower by the wife and of the love and affection he has for her, gives her a sum of money to be taken from the clear assets of his estate, provided that she survive him, payable immediately after his death, monthly or otherwise as she may require, as a marriage portion in lieu of dower," with a further covenant that "if the wife predecease the husband, without issue, or having had issue such issue, having predeceased herself, her heirs shall have no right to the sum which shall vest in him the husband *à titre de reversion*," is not a stipulation of prefixed or conventional dower, nor a gift or gratuitous disposition, but a synallagmatical agreement or bargain that the husband shall pay the sum in consideration of the renunciation by the wife of her dower rights. Hence, in the event of the predecease of the wife leaving children issue of the marriage, and of such children being her heirs-at-law, she having died intestate, they have the right to be paid the sum out of their father's estate, not by right of dower (*à titre de douairiers*) but as the representatives of their mother. They are not bound, therefore, as a condition precedent to the recovery of the sum, to renounce the succession of their father, or any benefit accruing to them under his will.

20. Even in the view that the above marriage covenant is gratuitous or a gift, it is a donation *inter vivos* and not *mortis causa*, nor is it subject to a suspensive condition that the donee survive the donor.—*Hogan et al. v. Eadie et al.*, C. S., Doherty, J., 404.

MARI ET FEMME—*Suite.*

10. La donation de biens faite à la femme par contrat de mariage comme gain de survie, ne prend effet qu'au décès du mari. Du vivant de ce dernier la femme n'a aucun droit à ces biens, ni qualité pour former opposition à la saisie qui en est faite par les créanciers du mari.

20. La donation contractuelle des biens mobiliers lorsqu'elle n'est pas suivie de tradition réelle au donataire et de possession publique par lui est sujette à l'enregistrement.

30. Les cadeaux de noces sont censés faits à la future épouse et sont sa propriété sous le régime de la séparation de biens.—*Proulx v. Klineberg & Sheffer, C. S., Larue, J., 1.*

V. PROCÉDURE, VO EXÉCUTION DES JUGEMENTS, 321.

MASTER AND SERVANT :—V. LOUAGE D'OUVRAGE, 360.

NANTISSEMENT :—V. VENTE A RÉMÉRÉ, 523.

PREUVE :—V. BAIL A LOYER, 494 ; PROPRIÉTÉ, 194, 293.

PRINCIPAL & AGENT :—V. MANDAT, 229.

PRIVILÈGE :—Une corporation tenue à l'entretien d'un chemin public qui convient par contrat avec une compagnie que celle-ci pourra construire et exploiter un tramway dans le chemin à la condition d'en faire les travaux d'entretien, n'acquiert aucun privilège sur ce tramway pour le coût de ces mêmes travaux qu'elle se voit forcée d'exécuter à raison de la déconfiture de la compagnie. *Morse v. The Lévis County Ry. Co. & La Commission des chemins à barrière de la Rive Sud, opp. & The New York Trust Co., Cont., C. S., Larue, J., 353.*

PRIVILÈGE DU VENDEUR :—V. PROCÉDURE CIVILE, VO DELAI POUR CONTESTER PROCÈS-VERBAL D'HUISSIER, 48.

PRIVILÈGE SUR LES IMMEUBLES :—10. Les frais d'une action pour recouvrer une dette privilégiée sur un immeuble sont privilégiés au même titre que la dette dont ils sont l'accessoire. Le créancier a donc l'action hypothécaire pour les recouvrer d'un tiers acquéreur de l'immeuble affecté au privilège.

20. Le jugement qui déboute un demandeur d'une action en recouvrement de frais pour le motif qu'elle appartient à son procureur *ad litem* en vertu de la distraction de dépens, ne constitue pas chose jugée dans une deuxième poursuite intentée par le même demandeur pour recouvrer les mêmes frais en vertu d'une cession que lui en a consentie son procureur *ad litem*.

30. Lorsqu'une action intentée devant un tribunal incompétent

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ratione materie est renvoyée d'office devant le tribunal compétent, le dépôt du montant réclamé fait par le défendeur avant que le renvoi n'ait eu lieu ne le soustrait pas à l'obligation de payer les frais. — *L'Hôpital-Général v. Dufresne et vir*, C. S., Langelier, J. C. Sup. 530.

PROCÉDURE :—ACTION EN BORNAGE :—L'action en bornage dans laquelle le demandeur se plaint d'un empiètement par le défendeur et demande à être déclaré propriétaire de la partie d'immeuble où il est troublé, revêt le caractère d'une revendication et, dès lors, les recours en garantie que le défendeur peut avoir lui sont ouverts. Cf. *Blackburn v. Blackburn*, 11 Q. L. R. 170.—*La Fille de Chicoutimi v. Lavoie & Guay*, *dfd. en gar.*, C. R., Langelier, J. C. Sup., Le mieux et Sir C. A. P. Pelletier, JJ., 148.

V. PROPRIÉTÉ, 194.

ACTION EN COMPLAINTE :—Les concessionnaires de permis de coupe de bois sur les terres du domaine public ont une possession des étendues (*limits*) comprises dans ces permis, qui donne ouverture en leur faveur au recours de l'action en complainte contre ceux qui les troublent. Cf., en sens contraire. *Price v. Girard*, 28 C. S., 244 *Breakey v. Bilodeau*, C. S., Carroll, J., 142.

V. DROIT MUNICIPAL, VO CHEMIN PUBLIC, 256.

ACTION EN GARANTIE :—V. ACTION EN BORNAGE, 148.

ACTION POSSESSOIRE :—10. Possession on which to ground a possessory action (*possession utile*) will not be inferred from a title to a real right registered before the making of the cadastre in the locality where the immovable affected is situate and of which the registration has not been renewed, as against the purchaser of the immovable, free from the incumbrance, by a title registered subsequently to the making of the cadastre.

2. No possessory action *en complainte* will lie for acts of disturbance committed more than a year before it is brought.—*Gagnon v. Delisle*, C. S., McCorkill, J., 207.

ATTACHMENT :—V. SAISIE-ARRÊT.

ATTACHMENT BEFORE JUDGMENT :—V. SAISIE-ARRÊT AVANT JUGEMENT, 215.

CERTIORARI :—V. DROIT CRIMINEL, VO TRAVAUX FORCÉS, 95.

CESSION DE BIENS :—Lorsque sur la contestation d'un bordereau

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de dividende par un créancier qui se plaint de ne pas y figurer pour le montant intégral de sa réclamation par privilège, il intervient un jugement qui la maintient et ordonne au curateur de préparer un autre bordereau, il suffit de désintéresser le créancier en le payant et dans ce cas le curateur n'est pas tenu de préparer un nouveau bordereau :—*Guimont, failli v. Damphousse et al., curateurs de La Cie de Brasserie de Beauport, req., C. R., Routhier, J. C., Larue & Langelier, J.J., 358.*

10. Celui qui exerce un métier (v. g. la mégisserie) consistant à traiter des matières appartenant à autrui et dont il ne fait pas l'achat pour les revendre, n'est pas commerçant aux termes du §2 de l'art. 853 C. P. C. Il n'est partant pas tenu de se rendre à une demande de cession de biens formée contre lui.

20. Le déposant n'est pas le créancier du depositaire pour la valeur du dépôt au sens du même article. Par suite, une créance qui ne s'élève à \$200 ou plus, qu'en y ajoutant une réclamation de cette nature ne donne pas droit de former une demande de cession de biens :—*Vermette, v. Vermette, C. S., Lemieux, J., 533.*

V. SOCIÉTÉ COMMERCIALE, 37.

CHOSE JUGÉE :—V. PRIVILÈGE SUR LES IMMEUBLES, 530.

COUR SUPÉRIEURE (JURIDICTION DE LA) :—V. DROIT MUNICIPAL, VO RÈGLEMENT ULTRA VIRES, 333.

DÉLAI POUR CONTESTER PROCÈS-VERBAL D'HUISSIER :—10. A motion for leave to contest the truth of a *procès-verbal* of seizure under art. 236 C. C. P. should be made at the earliest possible moment after its alleged falsity becomes known, and the delay of three days prescribed in the 73d. rule of practice touching irregularities, is a reasonable delay therefor.

20. The right of the unpaid vendor to revendicate the thing sold, provided in articles 1998 and 1999 C. C. is subject to the condition that it be still entire and in the same state as when sold. Timber sold to a dealer and delivered in his yard, though mixed in piles with his other stock, may still be entire and in the same condition as at the time of the sale.—*Pariseau v. Desmarceau et al., C. R., Archibald, Robidoux et Paradis, J.J., 48.*

EXÉCUTION DES JUGEMENTS :—A married woman who, without registration, for years carries on business under the name of her husband whom she allows to hire employees and to deal with them and the public as if he were the owner of her establishment, who allows a suit to be brought and judgment to be recovered against him by

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an employee for damages caused by an injury for which she is liable, is estopped from opposing the seizure under such judgment of the movables in the establishment in question. *Cuillerier v. Roy & Silateux et vir*, C. S., Doherty, J., 321.

EXÉCUTION DES JUGEMENTS :—Lorsqu'un bref de saisie mobilière et immobilière (*de bonis et de terris*) a été émis en exécution d'un jugement, il reste en vigueur tant qu'il n'a pas été satisfait, ce qui empêche l'émission d'un nouveau bref. Par suite, la saisie immobilière pratiquée en vertu d'un deuxième bref émis avant que le premier ne soit épuisé est nulle :—*Orcens v. Conway & Conway*, *oppt.*, C. R., Sir M. M. Tait, A. J. C., Loranger & Pagnuelo, JJ., 325.

V. SAISIE-ARRÊT, 416, 512, 520.

FRAIS D'ACTION :—V. PRIVILÈGE SUR LES IMMEUBLES, 530.

GARANTIE SIMPLE :—V. RESPONSABILITÉ, 128.

HABEAS CORPUS :—The omission to mark a writ of *Habeas Corpus* in the manner prescribed in sect. 3, chap. 95, C. S. L. C., is not a ground of objection that can be taken by the party prosecuting the prisoner or opposing his discharge, more particularly after the merits of the cause of detention have been inquired into. The formality is one required for the instruction of the sheriff, gaoler or officer detaining the prisoner.

20. Affidavits taken *ex parte* in the manner provided in section 10 of the Extradition Act R. S. C. cap. CXLII are admissible as evidence in support of the charge for which the extradition of a fugitive is sought.

30. The sufficiency of such evidence is a matter for the judicial discretion of the extradition commissioner and his decision thereon is not subject to review in *Habias Corpus* proceedings.

40. The expression "fraud by an agent" in §4 of article 1 of the Extradition Treaty between Great Britain and the United States (Convention of 1889-90) is not confined to agents who misapply trust moneys, but is of general purport and extends to servants or employees of the Government, such as appraisers of imported goods subject to customs' duties.—*Chas. C. Browne & The United States of America*, C. S., Tasehereau, J., 363.

INJONCTION :—Le jugement sur une injonction émise dans une action en nullité d'une résolution d'un conseil municipal n'est pas un jugement final au sens du §1 de l'art. 52 C. P. C. et n'étant pas un de ceux visés aux §§2, 3 et 4, n'est pas susceptible de révision. *Perreault v. La Corporation de Lévis & Fournier*, *intvt.*, C. R., Langelier, J. C. Sup., Lemieux & Sir C. A. P. Pelletier, JJ., 123.

PROCÉDURE—*Suite*.

INTERVENTION :—L'achat à vil prix d'une créance par un parent des débiteurs et une action intentée par lui contre eux sur ce titre, sans volonté d'exécuter le jugement à intervenir, mais dans la vue de protéger les défendeurs, ne sont pas des actes illicites et n'ouvrent pas en faveur des autres créanciers, le recours de l'intervention pour contester la poursuite.—*Williamson et al. v. Bradshaw et al. & Turner, inter, C. R., Pagnuelo, Robidoux & Charbonneau, J.J., 166.*

JURIDICTION RATIONE MATERIE : V. PRIVILÈGE SUR LES IMMEUBLES, 530.

LOI LACOMBE :—V. SAISIE-ABRÊT, 416, 512, 620.

MANDAMUS :—1o. Le concours de trois conditions est nécessaire pour donner le droit de procéder par voie de *mandamus* : (a) un devoir d'office impératif à remplir par un corps ou un officier public, (b) le refus de l'accomplir et (c) le défaut de tout autre recours pour remédier aux conséquences de ce refus.

2o. Une corporation municipale n'a pas le devoir impératif de faire disparaître des barrières placées sur un de ses chemins par le Gouvernement Fédéral à l'endroit où un chemin de fer de ce dernier le traverse. L'acte des chemins de fer 1903 donne à la commission des chemins de fer le pouvoir d'accueillir et de juger les plaintes qui peuvent être faites à ce sujet, et cette juridiction est exclusive de celle des tribunaux ordinaires. Pour ces motifs, le recours du *mandamus* contre la corporation n'est pas ouvert.—*Carrier v. La Corporation de la paroisse Saint-Henri, C. S., Langelier, J., 45.*

V. DROIT MUNICIPAL, VO ELECTION DES CONSEILLERS DE VILLE, 153.

OPPOSITION A SAISIE :—V. EXÉCUTION DES JUGEMENTS, 321.

POSSESSORY ACTION :—V. ACTION POSSESSOIRE, 207.

PROCÈS PAR JURY :—A verdict that an explosion was due to the neglect of the defendant company (a Gas Co.) because the room in which it occurred was lit at the time by ordinary gas jets and that the resulting death, for which damages were sought, was not in any way due to the negligence of the deceased, is not one which the jury viewing the whole of the evidence could not reasonably find, although it was established that the method of lighting held negligent is universally adopted and there was no proof of any other fault in connection with the accident.—*Regan v. The Montreal Light, Heat & Power Co., C. R., Sir M. M. Tait, A. C. J., Tardieu & Loranger, J.J., 104.*

RÉVISION :—V. INJONCTION, 123.

SAISIE-ARRÊT :—L'article 1147a C. P. C. (*loi Lacombe*) est d'une application générale comme mode d'exécution volontaire des jugements de la Cour Supérieure aussi bien que de ceux de la Cour de Circuit Cf. *Larochelle v. Lavoie & Cie du Pacifique*, 27 C. S., 534.—*La Banque de Saint-Hyacinthe v. Desaulniers & Mallette*, C. S., Demers, J., 512.

L'art. 1147a C. P. C. (*loi Lacombe*) est une disposition générale et nonobstant la place qui lui est donnée dans le code sous la rubrique "*Procédure devant la Cour de Circuit*," il s'applique aux saisies-arrêts pratiquées en exécution de jugements de la Cour Supérieure. Cf. en sens contraire.—*Larochelle v. Lavoie & la Cie du chemin de fer du Pacifique*, 27 C. S., 534.—*Levinoff v. Fournier*, C. S., Charbonneau, J., 416.

Art. 1147a C. P. which forbids further attachment of wages when a declaration and deposit are made as therein provided applies to attachment by garnishment in the Superior Court as well as in the Circuit Court. Cf. *contra Larochelle v. Lavoie & C. P. R. Co.*, 27 C. S., 534.—*Mace v. Gardner & McMillan*, T. S. Mathieu, J., 520.

SAISIE-ARRÊT AVANT JUGEMENT :—A statement made *ab irato* by a party of affluent means that he will within twenty-four hours sell all the property he has and go to the States affords of itself no sufficient ground for proceeding against him by attachment before judgment.—*Daigle v. Dusseault*, C. S., McCorkill, J., 215.

SAISIE-GAGERIE :—When movables attached by *saisie-gagerie* in an action for rent by the landlord are removed into premises belonging to a third party, a second action will not lie to bring such party into the suit and to preserve the privilege of the plaintiff as against him. It is useless for such purposes and if brought will be dismissed as such.—*Simard v. Champagne et al.*, C. R., Sir M. M. Tait, A. C. J., Taschereau & Pagnuelo, JJ. 505.

SAISIE IMMOBILIÈRE :—EXÉCUTION DES JUGEMENTS, 325.

SAISSABILITÉ DES SALAIRES :—V. SAISIE-ARRÊT, 416, 512, 520.

PROMESSE D'ÉCHANGE :—V. CONTRAT D'ÉCHANGE, 171.

PROPRIÉTÉ :—10. Un terrain borné à une rivière navigable et graduellement emporté par l'affouillement de l'eau, ne cesse d'être dans le domaine privé pour tomber dans le domaine public, que lorsqu'il

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a été définitivement envahi et est devenu partie du lit de la rivière. Tant que le sol est préservé ou recouvert par des travaux exécutés par le propriétaire ou des tiers, le terrain dont il forme partie reste dans le domaine privé, et la concession que la Couronne prétend en faire lettres patentes comme dépendance du domaine public est nulle.

20. C'est au concessionnaire en vertu d'un tel titre, à qui on oppose le fait que le terrain a antérieurement formé partie du domaine privé, qu'il incombe de prouver comment il en est sorti pour tomber dans le domaine public. Par suite, à défaut de cette preuve, il ne saurait fonder sur un pareil titre, comme lui donnant le droit de propriété, une action en bornage contre le propriétaire d'un terrain contigu. *La Compagnie de Pulpe de Chicoutimi v. Racine*, C. R., Sir L. N. Casault, J. C., Andrews & Langelier, J.J., 194.

10. La cession par un particulier à une corporation municipale du terrain nécessaire pour l'élargissement d'une rue peut se faire verbalement et, lorsqu'elle est faite en considération de conditions à remplir, l'accomplissement de ces dernières copatitue une preuve suffisante d'acceptation de la cession. Par suite, les tiers ne sont pas reçus à en contester la validité pour cause d'absence de titre ou de déclaration formelle d'acceptation dans les archives de la corporation. La consignation qui s'y trouve d'une résolution pour déléguer à un membre du conseil le soin de s'aboucher et de s'entendre avec le cédant, serait un commencement de preuve suffisant, s'il en était besoin.

20. Un terrain menacé d'envahissement par les eaux et recouvert de constructions, quais, etc., pour l'en préserver, reste de même que ces travaux la propriété du riverain qui les a faits, ou pour qui ils ont été faits par des tiers.

30. Les déclarations dans un acte privé de la législature n'affectent pas les droits des tiers qui n'y sont pas spécialement mentionnés.

Un acte n'en est pas moins un acte privé, quoiqu'il ait été déclaré acte public pour en faciliter la preuve. A toutes autres fins il est public ou privé, selon qu'il est d'une application générale en vue du bien public, ou qu'il ne vise qu'un intérêt particulier et privé.—*Price v. La Compagnie de Pulpe de Chicoutimi & Le Procureur Général*, intet, C. S., Gagné, J., 293.

RAILWAY ACT :—V. RESPONSABILITÉ, 385.

RESPONSABILITÉ :—

ACCIDENT DU TRAVAIL :— Le patron dont l'industrie nécessite des opérations dangereuses est responsable d'un accident à un ouvrier causé par le défaut de ses employés de suivre les ordres qu'il

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leur donne touchant les précautions à prendre. Par suite, une compagnie minière est passible des dommages soufferts par un ouvrier à la suite de l'explosion de substances explosives laissées et oubliées dans un forage de rocher, après un essai manqué de minage, par les employés chargés de le curer. — *Blouin v. The Johnston Co., C. S., Malouin, J., 399.*

CHEMIN DE FER :—Under §4 of sect. 237 of the Railway Act (3 Ed. VII, cap. LVIII) an act of the Parliament of Canada, which provides that railway companies shall be liable for the loss of cattle killed on their roads, except when it is proved that such cattle "got at large through the negligence or wilful act or omission of the owner or his agent," no liability whatever is incurred by the company for contributory negligence or otherwise, when the case falls within the exception.—*Bourassa v. The Canadian Pacific Ry. Co., C. R., Taschereau, Pagnuelo & Saint-Pierre, JJ., 385.*

Le demandeur qui, prétendant avoir dû abattre son cheval blessé par un tramway, a actionné la compagnie propriétaire de ce dernier, comme responsable de l'accident, est à bon droit débouté de son action sur le double motif, d'une part, qu'il est établi par les témoignages recueillis et les circonstances de la cause, qu'au moment de la collision il condamnait son cheval à une allure trop vive, dans un endroit dangereux, et que, d'autre part, il n'a pu faire la preuve d'aucune faute à l'encontre de la compagnie ou de ses employés.—*Montreuil & The Quebec Ry Light and Power Co., C. R., Cimon, Larue & Sir C. A. P. Pelletier, JJ., 6.*

DÉNONCIATION CALOMNIEUSE :—10. Le surintendant d'une compagnie industrielle agit à l'occasion de son service ou de son mandat en traduisant les journaliers qu'elle emploie devant les tribunaux correctionnels sous prévention de désertion de leur service et d'obtention d'argent sous de faux prétextes. Par suite, s'il le fait sans cause et par malice, il engage la responsabilité de ses commettants. A ce titre, il est leur garant simple et a le droit d'intervenir, pour la contester, dans la poursuite dirigée contre eux par les accusés en recouvrement de dommages pour dénonciation calomnieuse.

20. Le surintendant d'une compagnie industrielle à qui un contre-maître fait rapport que des journaliers employés par elle ont déserté leur service et obtenu de l'argent sous de faux prétextes, agit avec cause probable en les traduisant devant les tribunaux sous prévention de ces offenses.—*Croteau v. The Arthabaska Water & Power Co. & Boyle, intvt, C. S., Malouin, J., 128.*

10. When the servants of a plate glass company are instructed to always bring back to its shop the old plate glass removed upon a new one being put in, or report their reasons for not doing so, the

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failure to comply with such orders is not sufficient of itself to justify a charge of theft against them. In such a case, the employer should make further inquiries and if he prefers a charge without doing so, he will be held to have acted without probable cause.

20. A corporation is liable in tort for false arrest when the charge is laid under instructions from its vice-president and local manager.

30. Disobedience to orders by which an employee lays himself open to a suspicion of theft amounts to contributory negligence and will be so considered in assessing the damages caused him by an arrest upon an unfounded charge for that offence.—*Léonard v. Ramsay et al.*, C. S., Saint-Pierre, J., 345.

LIBELLE :—An action for libel will be dismissed when the publication complained of does not on the face of it apply to the plaintiff and he fails to prove the *innuendo* that it was meant to apply to him.—*Morrell v. Grant*, C. R., Sir M. M. Tait, A. C. J., Loranger & Hutchinson, JJ., 327.

LIBELLE DANS UNE PROCÉDURE :—No action will lie for defamatory statements made in good faith by a garnishee in his declaration upon a seizure by garnishment. *Daoust v. Charbonneau*, C. R., Archibald, Robidoux & Paradis, JJ., 188.

The advice given by a family council on a petition for interdiction for habitual drunkenness, is a judicial proceeding, the occasion is privileged so that no liability for their statements can be incurred by those taking part in it.—*Coallier v. St Denis et al.*, C. S., Archibald, J., 340.

PÈRE :—Lorsque dans une action contre le père en recouvrement des dommages causés par son enfant mineur, il y a preuve que le fait est survenu par accident sans intention malicieuse pendant que l'enfant jouait avec la victime, un camarade habituel, sous les yeux de la mère de ce dernier, alors que ses parents avaient raison de le croire suffisamment surveillé; que du reste cet enfant, quoique turbulent, n'a pas de mauvais instincts et a été élevé d'une façon convenable, cette preuve suffit pour établir que le père poursuivi n'aurait pas pu empêcher le fait imputé et, partant, pour dégager sa responsabilité.—*Deschamps v. Berthiaume* C. R., Sir M. M. Tait, A. J. C., Taschereau & Pagnuelo, JJ., 135.

PRESSE :—10. C'est le droit anglais, en vertu duquel la liberté constitutionnelle de la presse existe au Canada, qui s'applique aux actions pour diffamation dans les journaux et aux défenses fondées sur l'immunité (*privilege*) ou la critique légitime (*fair comment*).

20. Sous l'empire de ce droit, le concours de trois éléments est

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nécessaire pour soustraire l'auteur d'un écrit diffamatoire à la responsabilité civile : 1o il faut que l'écrit soit vrai, 2o qu'il porte sur des faits qui intéressent le public et 3o qu'il ait été publié pour servir l'intérêt public et sans mauvaise intention (*malice*).—*Marquette v. Bolduc*, C. S., Langelier, J., 222.

TRESPASS :—The rule that an action will not lie to recover the value of timber cut in trespass where the boundary has not been settled between contiguous lands applies to cases of presumed error and good faith, but not to cases of undoubted and inexcusable trespass. —*Papineau v. Jasmin*, C.R., Sir M. M. Tait, A. C. J., Archibald & Robidoux, JJ., 193.

V. DROIT MUNICIPAL, VO CHEMIN, 24, RESPONSABILITÉ, VO PROCÉDURE, VO PROCÈS PAR JURY, 104.

REVENDECTION DE CHOSE VENDUE POUR NON PAIEMENT DU PRIX :—V. PROCÉDURE CIVILE, VO DÉLAI POUR CONTESTER RAPPORT D'HUISSIER, 48.

SERVITUDE :—Une corporation municipale ne peut pas faciliter par le système d'égroutement de ses chemins, l'écoulement des eaux, eaux sales, etc, des fonds supérieurs sur les fonds inférieurs riverains. Le recours de l'action négatoire est ouvert en faveur des propriétaires de ces derniers, pour faire cesser l'aggravation de servitude qui leur est ainsi causée.—*Desbiens v. La Corporation du village de Jonquières*, C. R., Langelier, J. C. Sup., Lemieux & Sir C. A. P. Pelletier, JJ., 376.

1o. La vente d'un immeuble désigné "lot No 5 de la subdivision " du lot No 212 du cadastre, etc," avec l'usage en commun avec toutes personnes y ayant droit des rues bornant le lot, lorsque le plan de subdivision précédemment déposé pour enregistrement par le vendeur, contient l'indication d'une lisière destinée à servir de rue, est un titre constitutif de servitude de passage suffisant, et donne à l'acheteur le recours de l'action confessoire contre l'acquéreur sub-séquent de la lisière qui forme le fonds servant.

2o. C'est le propriétaire du fonds dominant qui doit faire les travaux nécessaires à l'établissement et à la conservation du passage sur le fonds servant. L'obligation du propriétaire de ce dernier se réduit à subir la servitude et à rien de plus.—*Lamontagne v. Leclerc et vir*, C. R., Tellier, J., 418.

SIMULATION :—V. VENTE A RÉMÉRÉ, 523.

SOCIÉTÉ :—La société formée entre un notaire et un avocat pour opérer à la bourse par l'achat de valeurs dans le but de les revendre avec profit, est une société commerciale. Par suite, les réclamations ré-

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épiques des associés sont prescrites par cinq années à compter de leur échéance, à savoir, du moment où la société prend fin.—*Myler v. Huot & Huot*, C. R., Taschereau, Loranger & Pagnuelo, J.J., 483.

V. BAIL A FERME, 68.

SOCIÉTÉ COMMERCIALE :—Une demande de cession de biens à une société commerciale qui n'est pas suivie du dépôt par elle de la déclaration et du bilan prévus à l'art. 859 C. P. C., ni d'aucune procédure ultérieure, ne la constitue pas en état de faillite de façon à causer sa dissolution.

Une société commerciale dissoute par la faillite continue d'exister comme personne morale et peut agir comme telle pour les fins de sa liquidation.

Dans l'un et l'autre cas, la société poursuivie est recevable à exercer les recours en garantie qu'elle peut avoir contre des tiers. *Black et al. v. Carrier et al. & The North Shore Power Ry & Navigation Co.*, C. S., Sir C. A. P. Pelletier, J., 37.

TESTAMENT :—1o. Est nul comme testament suivant la forme authentique, celui fait devant un notaire et deux témoins, dans lequel il n'est pas fait mention qu'il a été lu au testateur par le notaire en présence des témoins.

2o. Un testament nul suivant la forme authentique, à cause de l'omission d'une formalité, peut être valide suivant une autre forme, s'il contient tout ce qu'exige cette dernière. Par suite, un testament signé, à la fin, de son nom par le testateur, devant un notaire et deux témoins idoines présents en même temps et qui l'attestent et le signent de suite en présence et à la réquisition du testateur, quoique nul suivant la forme authentique, parce qu'il n'énonce pas l'accomplissement de cette formalité, est valide d'après le mode dérivé de la loi d'Angleterre.

3o. La vérification de deux testaments qui contiennent les mêmes dispositions, dont l'un nul suivant la forme authentique est valide suivant la forme anglaise et l'autre est olographe peut se faire au cours de l'instance où ils sont invoqués.

4o. La disposition finale dans un testament fait par un prêtre de la religion catholique, à la suite de legs particuliers, par laquelle il lègue "*tout le reste de mes biens ecclésiastiques*" est un legs universel de tous les biens restant au testateur.—*Blouin et al. v. Le Séminaire de Rimouski*, C. R. Routhier, J. C., Cimon & Langelier, J.J., 97.

VENTE :—1o. A sale of all the hay in certain mows or stacks, at a fixed price per ton, is a sale of a specific thing and passes the property of the hay to the purchaser.

2o. The buyer at such a sale, however, who revendicates the hay,

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is bound as a condition, precedent, to tender the price and, on refusal, to bring it into Court.—*Brown v. Lauzon*, C. R., Archibald, Robidoux & Paradis, JJ., 178.

The words "a dealer trading in similar articles" in art. 1489 C. C. mean a trader whose ostensible business is to deal in similar articles. Hence a pedler of fruits and vegetables, although he may occasionally buy and sell horses, is not a dealer trading in horses within the meaning of the article.—*Vézina v. Brosseau*, C. R., Sir M. M. Tait, A. C. J., Taschereau & Paradis, JJ., 493.

V. PROCÉDURE CIVILE, VO DÉLAI POUR CONTESTER RAPPORT D'HUISSIER, 48.

VENTE À L'ENCHÈRE:—V. GAGE, 86.

VENTE À RÉMÉRÉ :—L'acheteur d'un immeuble sous la condition du droit de réméré par le vendeur dans un délai de six ans qui en laisse la possession à ce vendeur moyennant une rente annuelle, avec stipulation que le défaut de la payer deux mois après son échéance entraînera la perte de la faculté de réméré, proroge de trois mois le délai de six ans susmentionné en écrivant au vendeur une lettre ainsi conçue : "En réponse à votre lettre, je vais laisser les actes comme ils sont ; pour l'intérêt dû prochainement, j'espère que vous ne dépasserez pas trois mois ; c'est votre avantage encore plus que le mien de travailler à rencontrer vos intérêts corrects, car plus on a d'argent à donner à la fois plus il est difficile de payer. Soyez sans inquiétude, quoique votre réméré soit fini, je ne ferai rien vendre et vous attendrai trois mois pour votre intérêt. Espérant vous donner satisfaction par ce délai que je considère raisonnable, votre, etc.—*Dupont v. Clouthier*, C. R., Langelier, A. J. C., Lemieux & McCorkill, JJ., 514.

Un acte qualifié par les parties de vente à réméré est, en réalité, quant à elles, un simple nantissement s'il est constant que l'intention de l'acheteur en le souscrivant n'était que de prendre une garantie pour le remboursement d'une dette et non de faire l'acquisition de l'immeuble. La possession qui en est laissée au soi-disant vendeur au-delà du terme du réméré et la reconnaissance de l'acheteur suffisent pour établir cette intention. Du reste, quelle qu'en soit la portée entre les parties, l'acte simulé vaut ce qu'il est à sa face et prend effet comme tel vis-à-vis des tiers.—*Grégoire v. Beaurivage et al.*, C. S., Langelier, J. C. Sup., 523.

VENTE IMMOBILIÈRE :—La garantie que le vendeur d'un immeuble doit à son acheteur, en ce qui touche les impôts ou taxes municipales, ne comprend que ce qui est dû ou échu lors de la vente, et ne s'étend pas à ce qui devient exigible après. Cette règle s'applique aussi

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bien aux taxes spéciales ou extraordinaires, qu'aux taxes générales et ordinaires.—*Bourdon v. Deslongchamps*, C. R., Sir M. M. Tait, J. C., Taschereau & Paradis, JJ., 477.

VENTE SOUS CONDITION RÉSOLUTOIRE :—A contract by the acceptance of a proposal to purchase shares in a joint stock company for a price payable, half in bonds and half in preferred stock of a company to be formed, with a covenant that the shares purchased shall be deposited as security for the payment of the bonds and that so soon as all the shares of the company are so deposited and its real estate is transferred to the new company, a mortgage deed will be executed to secure the payment of the bonds, is a sale subject to a resolutive condition. In the event of the new company acquiring the property of the old one and mortgaging it to secure the bonds given in payment, the sale becomes complete and effective. In the event of such acquisition not being made or being rendered impossible then the consideration, viz the bonds secured by mortgage, failing, the sale is ineffective and subject to resolution at the suit of the seller.—*Angers v. The Dominion Textile Co.*, C. S., Archibald, J., 58.



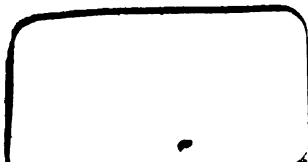




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